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2-3-48
No. 12026

United States
Court of Appeals
for the Ninth Circuit


UNITED STATES OF AMERICA,
Appellant,
vs.
IRENE ETHEL LAMBETH,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

[FILED]

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

HENRY L. HESS,

United States Attorney and

FLOYD D. HAMILTON,

Assistant United States Attorney,

United States Court House,

Portland, Oregon,

for Appellant.

WILLIAM H. HEDLUND and

ARTHUR S. VOSBURG,

909 American Bank Building,

Portland, Oregon,

Attorneys for Appellee.

In the District Court of the United States
For the District of Oregon

No. Civ. 3987

IRENE ETHEL LAMBETH,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That at all times mentioned herein the plaintiff was and now is a citizen and inhabitant of the State of Oregon residing at 7322 S.W. Canyon Drive in the County of Washington, State of Oregon.

II.

That during the period from May 1, 1943 to and including September 18, 1944, James W. Maloney was the duly appointed and acting Collector of Internal Revenue for the State of Oregon; that subsequent to the 18th day of September, 1944 and prior to the time of filing this complaint, James W. Maloney ceased to be the Collector of Internal Revenue for Oregon.

III.

That this is an action for recovery of money paid by plaintiff to James W. Maloney, Collector of Internal Revenue for the State of Oregon, pur-

suant to notice and demand for tax assessed by James W. Maloney as Collector of Internal Revenue of the United States under the tax laws of the United States; that jurisdiction of this court is based on Section 24 (20) of the Judicial Code of the United States, Title 28, 1. Complaint. [1 *] Section 41, subdivision 20 U.S.C.A.

IV.

That on or about the 7th day of September, 1944, James W. Maloney as Collector of Internal Revenue of the United States made a jeopardy assessment against plaintiff and demanded of plaintiff the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars on account of cabaret admission taxes and accrued interest thereon claimed to be due defendant and assessed by James W. Maloney as Collector of Internal Revenue of the United States against plaintiff for the period commencing May 1, 1943 and ending July 31, 1944.

V.

That said assessment and collection for alleged taxes in the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars was and is illegal and not within the purview of the Internal Revenue Laws of the United States in that during all of the aforementioned period the plaintiff was not operating a roof garden, cabaret, or other similar place furnishing a public performance for profit, but was in truth and in fact managing and operating The Cozy Club, a private club

*Page numbering appearing at foot of page of original certified Transcript of Record.

organized under the laws of the State of Oregon as a non-profit corporation; that the said Cozy Club and the operations conducted by plaintiff were not open to the public; that during the aforementioned period prior to September 17, 1943, no facilities were provided at The Cozy Club for dancing and no dancing or other performance occurred at said club.

VI.

That plaintiff paid said assessment under protest on the 18th day of September, 1944; that said money is now held by defendant for the use and benefit of plaintiff; that subsequent to the 18th day of September, 1944 and on or about the 28th day of September, 1944 plaintiff filed a claim for [2] refund for the aforementioned sum; that said claim for refund was denied by the Collector of Internal Revenue by registered letter mailed to plaintiff on the 28th day of March, 1946.

Wherefore, plaintiff prays the court for a judgment against defendant in the amount of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, together with interest thereon from September 18, 1944, and for her costs and disbursements incurred herein.

WILLIAM H. HEDLUND,
ARTHUR S. VOSBURG,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed December 18, 1947.

[3]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, the United States, by its attorney, Henry L. Hess, United States Attorney in and for the District of Oregon, and for its answer to the complaint filed herein alleges and says:

I.

Admits the allegations contained in paragraphs numbered I and II thereof.

II.

Admits the allegations contained in paragraphs numbered III and IV thereof, except that it is alleged that the money sought to be recovered herein representing cabaret taxes and accrued interest thereon paid by plaintiff was assessed against plaintiff by the Commissioner of Internal Revenue and not by James W. Maloney, as Collector of Internal Revenue, as alleged in said paragraphs.

III.

Denies the allegations contained in paragraph numbered V thereof.

IV.

Denies the allegations contained in paragraph numbered VI thereof, except that it is admitted that on or about September 28, 1944, plaintiff filed a claim for refund of the taxes sought to be recovered herein. Further answering said paragraph, the defendant alleges that [4] the claim for refund filed by plaintiff was rejected by the Commissioner of Internal Revenue and not by the Collector of

Internal Revenue by registered letter mailed to plaintiff on February 11, 1946, instead of on March 28, 1946, as alleged in said paragraph.

Wherefore, the defendant prays that the complaint be dismissed with costs to be assessed against plaintiff.

/s/ HENRY L. HESS,
United States Attorney,
Attorney for Defendant.

/s/ FLOYD D. HAMILTON,
Assistant U. S. Attorney.

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Answer on the plaintiff herein, by depositing in the United States Post Office at Portland, Oregon, on the 16th day of February, 1948, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to William H. Hedlund and Arthur S. Vosburg, Attorneys of record for plaintiff, 909 American Bank Building, Portland, Oregon.

FLOYD D. HAMILTON.

[Endorsed]: Filed February 16, 1948.

[5]

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled action came on regularly for pretrial conference before the Hon. Claude McCulloch, one of the judges of the above entitled court. Plaintiff appeared in person and by and through Arthur S. Vosburg and William H. Hedlund, her attorneys, and defendant appeared by and through Floyd D. Hamilton, Assistant United States Attorney; whereupon after pretrial conference the following proceedings were had:

JURISDICTION

This action was brought and the jurisdiction of this court is invoked by plaintiff under Sec. 24 (20) of the Judicial Code of the United States, Title 28, Sec. 41, Subdivision 20, U.S.C.A. to recover moneys allegedly, illegally, excessively, and erroneously assessed as cabaret taxes and collected from plaintiff by defendant.

AGREED FACTS

I.

That at all times mentioned herein the plaintiff was and now is a citizen and inhabitant of the State of Oregon, residing at 7322 S.E. Canyon Drive, in the County of Washington, State of Oregon.

II.

That during the period from May 1, 1943 to

and including September 18, 1944, James W. Maloney was the duly appointed and acting Collector of Internal Revenue for the State of Oregon; that subsequent to the 18th day of September, 1944 and prior to the time of the filing of this complaint, James W. Maloney ceased to be the Collector of Internal Revenue for Oregon. [6]

III.

That on or about the 7th day of September, 1944 the Commissioner of Internal Revenue of the United States made a jeopardy assessment against plaintiff and demanded of plaintiff the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, on account of cabaret admission taxes and accrued interest thereon claimed to be due defendant and assessed by said Collector of Internal Revenue of the United States against the plaintiff for the period commencing May 1, 1943 and ending July 31, 1944.

IV.

The plaintiff paid to defendant under protest said sum of Six Thousand and Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, being the amount of said assessment, on the 18th day of September, 1944; that on the 28th day of September, 1944, plaintiff filed a claim for refund of the taxes sought to be recovered herein; that said claim for refund filed by the plaintiff was rejected by the Commissioner of Internal Revenue by registered letter mailed to plaintiff on February 11, 1946.

V.

That the computation of the tax assessed is as follows:

Month	Income	Rate of Tax	Amount of Tax	Interest
1943				
May	\$ 914.00	5%	\$ 45.70	3.24
June	1678.60	5%	83.93	5.52
July	1617.21	5%	80.86	4.92
August	1699.10	5%	84.96	4.76
September				
1st to 17th	1252.73	5%	62.63	3.18
17th to 30th	957.97	5%	47.90	2.44
October	2443.00	5%	122.15	5.62
November	2795.95	5%	139.80	5.71
December	2835.15	5%	141.76	5.08
1944				
January	3838.10	5%	191.91	5.98
February	3685.61	5%	184.28	4.76
March	4549.10	5%	227.46	4.77
April	4656.50	30%	1396.95	22.10
May	5054.40	30%	1513.62	16.63
June	4790.50	30%	1437.15	8.37
July	5264.55	20%	1052.91	.86
			<hr/>	<hr/>
			\$6813.97	103.94

CONTENTIONS OF PARTIES

Plaintiff Contends:

That said assessment and collection for alleged taxes in the sum of Six Thousand Nine Hundred Seventeen and 91-100 (\$6,917.91) Dollars was and is illegal and not within the purview of the Inter-

nal Revenue Laws of the United States in that during all of the aforementioned period the plaintiff was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit, but was in truth and in fact managing and operating The Cozy Club, a private club organized under the laws of the State of Oregon as a non-profit corporation; that said The Cozy Club and the operations conducted by plaintiff were not open to the public; that during the aforementioned period prior to September 17, 1943, no facilities were provided at The Cozy Club for dancing and no dancing or other performance occurred at said club during said period.

Defendant Contends:

That the plaintiff was operating a roof garden, cabaret or similar place furnishing a public performance for profit, and that the operations conducted by plaintiff during the said period were open to the public.

ISSUES OF FACT AND OF LAW TO BE DETERMINED

Did the operations of plaintiff between May 1, 1943 and September 1, 1944, or any portion of that period, constitute furnishing a public performance for profit at a roof garden, cabaret or or other similar place as defined by Section 1700 (e) Title 26, U.S.C.A.?

What sum of money, if any, is plaintiff entitled to recover in this action?

EXHIBITS

A list of the exhibits proposed to be introduced by plaintiff hereto marked "Exhibit A", and a list of the exhibits proposed to be introduced by the defendant is attached hereto marked "Exhibit B"

The objections of the parties, if any, to the admissibility of each of the above exhibits in evidence at the trial are reserved until time of trial.

This order supersedes the pleadings which now have no further function in the case and shall not be changed after signature or during the trial except by agreement of the parties or on the order of the court to prevent manifest injustice.

Dated April 7th, 1948.

/s/ CLAUDE McCOLLOCH,
District Judge.

Approved:

UNITED STATES ATTORNEY,
By /s/ FLOYD D. HAMILTON,
Assistant U. S. Attorney.
/s/ ARTHUR S. VOSBURG,
/s/ WILLIAM H. HEDLUND,
Attorneys for Plaintiff. [9]

EXHIBIT A

Exhibits Proposed by Plaintiff

1. Minute book of The Cozy Club.
2. Lease dated May 29, 1943 between Title and Trust Company and The Cozy Club, Inc.
3. 1944 Roster of The Cozy Club.
4. Partial list of members of The Cozy Club, 1943.

5. Applications for membership in The Cozy Club, 1944.

6. Membership card of Violet Mullins. [10]

EXHIBIT B

Exhibits Proposed by Defendant

1. Article of Incorporation of The Cozy Club.

2. Certificate of Filing Supplementary Articles of Incorporation of The Cozy Club.

3. By-Laws of The Cozy Club, Inc., adopted December 20, 1936.

4. Amended By-Laws of The Cozy Club, Inc.

5. Minutes of Special Meeting of Members of The Cozy Club, Inc., October 13, 1941.

6. Minutes of Special Meeting of Members of The Cozy Club, Inc., June 5, 1944.

7. Minutes of Special Meeting of Board of Directors of The Cozy Club, Inc., October 13, 1941.

8. Minutes of Special Meeting of Board of Directors of The Cozy Club, Inc., January 3, 1944.

9. Minutes of Meeting of Board of Directors of The Cozy Club, Inc., June 12, 1944.

10. (a) Form 11-B Treasury Department, Internal Revenue Service, November 17, 1942.

(b) Form 11-B Treasury Department, Internal Revenue Service, June 16, 1943.

(c) Form 11-B, Treasury Department, Internal Revenue Service, July 6, 1943.

11. Ledger Sheets of La Fiesta Club for year 1943.

12. Ledger Sheets of La Fiesta Club for year 1944.

[Endorsed]: Filed April 7, 1948. [11]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial before the Hon. Claude McColloch, judge of the above entitled court, on April 7, 1948, plaintiff appearing in person and by her attorneys, Arthur S. Vosburg and William H. Hedlund, and defendant appearing by and through Floyd D. Hamilton, Assistant United States Attorney. After opening statements by respective counsel, witnesses were sworn and testified on behalf of plaintiff and on behalf of defendant, and the court having heard the evidence and closing arguments of respective attorneys, took the same under advisement, and now being fully advised in the premises, makes the following

FINDINGS OF FACT

I.

That this action was brought and this court has jurisdiction under Section 24 (20) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 20, U.S.C.A., to recover moneys illegally, excessively and erroneously assessed as cabaret taxes and collected from plaintiff by defendant.

II.

That at all times mentioned herein the plaintiff was and now is a citizen and inhabitant of the State of Oregon, residing at 7322 S.W. Canyon Drive, Washington County, Oregon.

III.

That during the period from May 1, 1943 to and including September 18, 1944, James W. Maloney was the duly appointed and acting Collector of Internal Revenue for the State of Oregon; that subsequent to the 18th day of September, [12] 1944 and prior to the time of the filing of the complaint herein, James W. Maloney ceased to be the Collector of Internal Revenue for Oregon.

IV.

That on or about the 7th day of September, 1944 the Commissioner of Internal Revenue of the United States made a jeopardy assessment against plaintiff and demanded of plaintiff the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars on account of cabaret admission taxes and accrued interest thereon claimed to be due defendant and assessed by said Commissioner of Internal Revenue of the United States against the plaintiff for the period commencing May 1, 1943 and ending July 31, 1944.

V.

That plaintiff paid to defendant under protest said sum of Six Thousand and Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, being the amount of said assessment, on the 18th day of September, 1944; that on the 28th day of September, 1944, plaintiff filed a claim for refund of taxes sought to be recovered herein, together with interest thereon as provided by the Internal Revenue Code and the regulations promulgated thereunder; that said claim for refund filed by the

plaintiff was rejected by the Commissioner of Internal Revenue by registered letter mailed to plaintiff on February 11, 1946.

VI.

That during all times for which the assessment was made by defendant against the plaintiff the plaintiff was not operating a roof garden, cabaret, or other similar place furnishing a public performance for profit; that at said time plaintiff was managing The Cozy Club, a private club organized under the laws of the State of Oregon as a non-profit corporation; that said The Cozy Club and the operations conducted by plaintiff were not open to the public and admission to the club room premises was open only to members of The Cozy Club and their guests; that admission to The Cozy Club premises was refused to persons other than members of The Cozy Club and their guests, and said premises were operated as a private and not a public establishment. [13]

And the court concludes:

CONCLUSIONS OF LAW

I.

That this court has jurisdiction of the controversy herein.

II.

That during all times for which the assessment was made by defendant against the plaintiff the plaintiff was not operating a roof garden, cabaret, or other similar place furnishing a public performance for profit, and that the imposition of

the tax against plaintiff in the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars was not within the purview of the provisions of the Revenue Act pertaining to cabaret taxes and the regulations promulgated thereunder.

III.

That the assessment and collection of cabaret taxes and interest thereon in the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars was illegal and erroneous and not authorized by the Internal Revenue laws of the United States.

IV.

That plaintiff is entitled to judgment against defendant in the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the 18th day of September, 1944, together with her costs and disbursements incurred herein.

Dated at Portland, Oregon, this 27th day of April, 1948.

/s/ CLAUDE McCOLLOCH,
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed April 27, 1948.

[14]

In the District Court of the United States
For the District of Oregon

No. Civil 3987

IRENE ETHEL LAMBETH,

Plaintiff,

vs.

THE UNITED STATES,

Defendant.

JUDGMENT

This matter coming on to be heard on motion of plaintiff, Irene Ethel Lambeth, for judgment, and the court having filed its Findings of Fact and Conclusions of Law and being fully advised in the premises;

Now therefore, it is considered, ordered and adjudged that plaintiff have and recover of and from defendant the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from September 18, 1944 until such time as interest ceases to accrue under Section 284(b), Title 28 U.S.C.A., and together with her costs and disbursements incurred herein taxed at \$30.60.

Dated at Portland, Oregon, this 27th day of April, 1948.

/s/ CLAUDE McCOLLOCH,
District Judge.

Entered in Docket April 27, 1948.

[Endorsed]: Filed April 27, 1948.

[15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Irene Ethel Lambeth, plaintiff above named,
and Arthur S. Vosburg and William H. Hedlund, her attorneys:

You and each of you will please take notice that the defendant, The United States, appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain judgment in the above-entitled cause made and entered the 27th day of April, 1948, by the Honorable Claude McColloch, Judge of the above-mentioned Court, wherein the plaintiff recovered of and from defendant the sum of Six Thousand Nine Hundred Seventeen and 91/100 (\$6,917.91) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from September 18, 1944 until such time as interest ceases to accrue under Section 284(b), Title 28, U.S.C.A., and costs and disbursements taxed at \$30.60.

HENRY L. HESS,

United States Attorney for the
District of Oregon.

/s/ FLOYD D. HAMILTON,

Assistant United States Attorney.

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Notice of Appeal on plaintiff herein, by depositing in the

United States Post Office at Portland, Oregon, on the 25th day of June, 1948, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Messrs. Arthur S. Vosburg and William H. Hedlund, Attorneys at Law, American Bank Building, Portland, Oregon, attorneys for plaintiff.

/s/ FLOYD D. HAMILTON. [17]

[Endorsed]: Filed June 26, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
ON BY DEFENDANT ON APPEAL

The defendant, United States of America, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment order made and entered herein on April 27, 1948, by the District Court of the United States for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

The District Court erred:

1. In finding that during the period involved plaintiff was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit.
2. In failing to find that during the period involved plaintiff was operating a roof garden, cabaret or other similar place furnishing a public performance for profit.

3. In finding that during the period involved plaintiff was managing and operating The Cozy Club as a private club not open to the public, and that admission to its club rooms was open only to members of the club and their guests.

4. In failing to find that during the period involved plaintiff was managing and operating The Cozy Club as a cabaret, [18] roof garden or other similar place furnishing a public performance for profit.

5. In concluding that during the period involved plaintiff was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit, and that the imposition of the tax against plaintiff in the sum of \$6,917.91 was not within the purview of the Revenue Act pertaining to cabaret taxes and the Regulations promulgated thereunder.

6. In failing to conclude that during the period involved plaintiff was operating a roof garden, cabaret or other similar place furnishing a public performance for profit, and that she was therefore not entitled to recover the sum of \$6,917.91 paid as cabaret tax and interest thereon pursuant to the purview of the provisions of the Revenue Act pertaining to cabaret taxes and the Regulations promulgated thereunder.

7. In concluding that the assessment and collection of cabaret taxes and interest thereon in the sum of \$6,917.91 was illegal and erroneous and not authorized by the internal revenue laws of the United States.

8. In concluding that plaintiff was entitled to judgment against the defendant in the sum of \$6,917.91, together with interest thereon at 6% per annum from the date of payment.

9. In failing to conclude that the defendant was entitled to judgment dismissing the complaint filed herein.

Dated this 27th day of July, 1948.

HENRY L. HESS,
United States Attorney for the
District of Oregon.

/s/ FLOYD D. HAMILTON,
Assistant U. S. Attorney,
Attorney for Defendant. [19]

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney, hereby certify that I have made service on the plaintiff of the foregoing Statement of Points to be Relied on by Defendant, on Appeal by depositing in the U. S. Post Office at Portland, Oregon, on the 27th day of July, 1948, a duly certified copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to Messrs. Arthur S. Vosburg and William H. Hedlund, Attorneys at Law, American Bank Building, Portland, Oregon, attorneys of record for plaintiff.

/s/ FLOYD D. HAMILTON,
Of Attorneys for Defendant.

[Endorsed]: Filed July 27, 1948.

[20]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled court:

The defendant, United States of America, hereby designates the entire record in this case to be contained in the record on appeal, more particularly described as follows:

1. Complaint
2. Defendant's Answer
3. Pre-trial Order
4. Transcript of Proceedings
5. All exhibits
6. Findings of Fact and Conclusions of Law
7. Judgment Order
8. Notice of Appeal
9. Statement of Points to be Relied on by Defendant on Appeal.
10. This designation

Dated this 27th day of July, 1948.

HENRY L. HESS,

United States Attorney for the
District of Oregon.

/s/ FLOYD D. HAMILTON,

Assistant United States Attorney.

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service upon the plaintiff of the within Designation of Contents of Record on Appeal, by depositing in the U. S. Post Office at Portland, Oregon, a duly certified copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to Messrs. William H. Hedlund and Arthur S. Vosburg, Attorneys at Law, 909 American Bank Building, Portland, Oregon, attorneys of record for plaintiff.

/s/ FLOYD D. HAMILTON,
Of Attorneys for Defendant.

[Endorsed]: Filed July 27, 1948. [22]

[Title of District Court and Cause.]

STIPULATION

It is hereby agreed and stipulated by and between counsel for the respective parties, subject to the approval of the Court, that the time within which the record on appeal must be filed and the within action docketed with the Circuit Court of Appeals for the Ninth Circuit may be extended to and including September 18, 1948.

Dated this 28th day of July, 1948.

/s/ FLOYD D. HAMILTON,
Assistant U. S. Attorney
Of Counsel for Defendant.

/s/ WILLIAM H. HEDLUND,
Of Counsel for Plaintiff.

The foregoing stipulation shall be without prej-

udice to the right of the plaintiff to move for a dismissal of the appeal and shall not be construed as a waiver of any such right.

/s/ FLOYD D. HAMILTON,
Assistant U. S. Attorney
Of Counsel for Defendant.

/s/ WILLIAM H. HEDLUND,
Of Counsel for Plaintiff.

[Endorsed]: Filed July 28, 1948.

[23]

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of defendant by Henry L. Hess, United States Attorney for the District of Oregon, and Floyd D. Hamilton, Assistant United States Attorney, for an order extending the time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals for the Ninth Circuit, for the reason that the record on appeal must be filed and the within action must be docketed with the Circuit Court of Appeals by August 5, 1948, and the Clerk of this court does not have sufficient time to file the record and docket the action by that date, and, based upon the stipulation of the parties, and the Court being fully advised in the premises, it is

Ordered that the time for filing the within appeal and docketing the action be, and it is hereby, extended to and including September 18, 1948.

Made and entered this 28th day of July, 1948.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1948. [24]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS

On motion of the defendant and appellant herein, and good cause appearing therefor, it is hereby

Ordered that all of the original exhibits in the above case be transmitted to the U. S. Circuit Court of Appeals for the Ninth Circuit, in connection with the appeal of the above case.

Dated this 28th day of July, 1948.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 28, 1948. [25]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled court:

The defendant, United States of America, in addition to the documents by it designated on July 28, 1948 to be contained in the record on appeal, hereby further designates the following documents to be contained in the record on appeal, to-wit.

1. Stipulation for Extension of Time to File the Record on Appeal and Docket the Action with the Circuit Court of Appeals.

2. Order Extending Time to File the Record on Appeal and Docket the Action with the Circuit Court of Appeals.

3. Order Transmitting Original Exhibits to the Circuit Court of Appeals.

4. This Supplemental Designation.

Dated this 30th day of July, 1948.

HENRY L. HESS,

United States Attorney for the
District of Oregon.

/s/ FLOYD D. HAMILTON,

Assistant United States
Attorney.

[26]

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, hereby certify

that I have made service of the foregoing Supplemental Designation of Contents of Record on Appeal on plaintiff herein by depositing in the United States Post Office at Portland, Oregon, on the 30th day of July, 1948, a duly certified copy thereof, enclosed in an envelope, with postage prepaid thereon, addressed to Messrs. Arthur S. Vosburg and William H. Hedlund, 909 American Bank Building, Portland 5, Oregon, attorneys for plaintiff.

/s/ FLOYD D. HAMILTON,
Assistant United States Attorney.

[Endorsed]: Filed July 30, 1948. [27]

[Title of District Court and Cause.]

DOCKET ENTRIES

1947

Dec. 18: Filed complaint.

Dec. 18: Issued summons—to Marshal.

Dec. 18: Filed affidavit of service to Atty. Genl.

Dec. 19: Filed summons with marshal's return.

1948

Feb. 16: Filed Defendant's Answer.

Mar. 1: Entered order setting for pre-trial April 5 and trial April 6, 1948. Fee.

Mar. 31: Filed motion of U. S. for production of documents.

Apr. 1: Entered praecipe U. S. for issuance of subpoena.

Apr. 1: Issued subpoena—to Marshal.

1948

- Apr. 1: Filed praecipe U. S. for issuance of subpoena.
- Apr. 1: Issued subpoena—to Marshal.
- Apr. 2: Filed (2) subpoenas with return.
- Apr. 2: Filed Motion to Produce.
- Apr. 5: Entered order resetting for trial on April 7, 1948. McC.
- Apr. 6: Filed praecipe U. S. for subpoena duces tecum.
- Apr. 6: Issued subpoena duces tecum—to Marshal.
- Apr. 7: Filed and entered pre-trial order. McC.
- Apr. 7: Record of trial before court and order taking under advisement. McC.
- Apr. 7: Filed exhibits 1 to 6a and b and 8 and 9.
- Apr. 9: Filed subpoena Duces Tecum.
- Apr. 27: Filed and entered Findings of Fact and Conclusions of Law. McC.
- Apr. 27: Filed and entered Judgment for plaintiff.
- Apr. 27: Filed cost bill of plaintiff.
- June 5: Filed transcript of proceedings of April 5 and 7, 1948.
- June 26: Filed Notice of Appeal.
- June 26: Copy of Notice of Appeal handed to Wm. Hedlund by Floyd D. Hamilton.
- July 27: Filed Statement of Points to be Relied on by defendant on appeal.
- July 27: Filed Designation of contests of record on appeal.
- July 28: Filed stipulation to extend time to docket cause in Circuit Court of Appeals.

1948

July 28: Filed and entered order extending time to docket cause in Circuit Court of Appeals to Sept. 18, 1948. McC.

July 28: Filed and entered order to transmit original exhibits to Circuit Court of Appeals.

July 30: Filed supplemental designation of record by U. S. [28]

CLERK'S CERTIFICATE

United States of America,

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 29 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3987, in which Irene Ethel Lambeth is Plaintiff and Appellee, and the United States is Defendant, and Appellant; that the said transcript has been prepared by me in accordance with the designation and supplemental designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designations as the same appear of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testi-

I am making a somewhat unusual request. I would like to have this case go over. It is set for pre-trial today and trial tomorrow. [1 *]

The reason for my request is this: This is a case involving the refund of a cabaret tax. The tax was paid for the period May 17, 1943, to September 17, I believe, 1944, and the plaintiff, Irene Lambeth, is now suing for a refund. There is approximately \$7,000 involved. I was advised by the Attorney-General, who prepared the answer, that the case had been thoroughly investigated by the Internal Revenue Department and that the issues were only two, and they were somewhat simple.

I had no information of the nature of my evidence and proof until about ten days ago when I discussed the matter with two deputy collectors. Since that time I have become dissatisfied with the nature of the evidence which they had for me, and I commenced an investigation of my own.

That investigation, your Honor, has necessarily not been thorough. I have had other things to do. However, I talked to several of the officials and it was not until last Friday and Saturday that certain information was conveyed to me of a rather disturbing nature.

I think that the interests of the Government would be prejudiced if we went ahead with this case at this time, I feel, not only as far as this claim involved here is concerned, but I think it may be, or could be, that the plaintiff owes the Government other taxes which have not been paid.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The information which I obtained leads me to believe that there is a possibility that in this venture which gave rise [2] to this tax the plaintiff was associated with two people in town who are so-called members of the underworld of Portland.

The Court: You had better transpose that—members of the so-called underworld.

Mr. Hamilton: Members of the so-called underworld, yes. Besides that, your Honor, and, further, I have talked with two gentlemen who have made statements which may possibly implicate two Government officials in wrongdoing in connection with this thing.

I am not prepared to make any charges or to say that any of the things are true, but I think before the Government goes ahead with the case that it should be thoroughly investigated. I am also advised that the usual procedure in tax cases of this nature is for the Intelligence Unit of the Bureau of Internal Revenue to make an investigation. That was not done in this case. The investigation was made by two deputy collectors who are not normally investigators.

I think under the circumstances that there are a lot of things below the surface. At least, the information I have been able to develop in the last few days leads me to believe that there is a lot below the surface that does not meet the eye. I think that matter should be settled before we go ahead with the case.

I realize that my request comes at a late mo-

ment. I did not have any of this information until Friday or Saturday— [3]

Mr. Vosburg: I had no intimation, your Honor, that counsel was going to make any request for a postponement until approximately 9:30, when counsel called me over the telephone and gave me a nebulous statement that he thought he should have a continuance, without giving any definite reasons therefor.

I cannot conceive that the more or less nebulous reasons which he gives now are sufficient grounds for a continuance. I take it counsel says that there may have been a wrong perpetrated against the United States, a conspiracy or some sort of thing. I do not see how the trial of the civil matter is in any manner going to affect any nebulous conspiracy or wrongdoing which counsel contends has taken place. If there has been a wrongdoing, as counsel seems to indicate, without giving us any definite idea as to what it is, I think the trial, if anything, is going to clarify counsel's ideas and it certainly will not prejudice any possible criminal action.

Besides the nebulous character of the charges made, there are some practical considerations. This case has been pending for a long time. It so happens that the plaintiff in this case is leaving this state and is only waiting here until the time of this trial. In addition, your Honor, we have an important witness who is remaining here at considerable expense to him and also considerable in-

convenience to him. We have brought him down to testify in this case.

The Court: From where? [4]

Mr. Vosburg: From Hanford, the Atomic Bomb Project.

I see no reason, your Honor, why this trial should not proceed. The civil issues can be determined here and certainly that cannot be to any prejudice of the Government. I certainly resist a continuance on no more stable grounds than have been presented to your Honor.

The Court: What is involved?

Mr. Vosburg: A little under \$7,000, your Honor. This covers a period from May 1, 1943, to September 1, 1944.

The Court: I will talk to you about it later in the morning.

(The Court then proceeded to the transaction of other business.)

The Court: Is there more to be said other than what has been said on the question of a continuance?

Mr. Vosburg: I do not think there is anything more, your Honor, except I can say this: The only issue in this case is the issue of whether or not the plaintiff in this case was conducting a public performance for profit. That is the sole issue to be determined by this Court. I do not understand how, if there are any additional taxes to be assessed, that would in any way affect the determination of this particular case. If there are some more taxes that have not been paid, they can be assessed. The

simple question before your Honor in this case is whether or not they were conducting a public performance for [5] profit, and the innuendo about possible criminal matters has nothing whatsoever to do with it. I think the case should be tried.

Mr. Hamilton: If I did not make it clear, your Honor, I will do so now, that the matters I referred to have a bearing on the issues in this case. They have a bearing on the evidence available and what evidence will be available.

The Court: The Government charges this was a public performance. Do you deny it?

Mr. Vosburg: I suppose the Government originally did charge that. In fact, they made a tax assessment, but in this case the plaintiff contends that they were conducting a private club and the Government has denied that.

The Court: That is what you understood to be the issue in the case, and the sole issue, Mr. Vosburg, before Mr. Hamilton spoke?

Mr. Vosburg: Yes, your Honor. I still think that is the only issue. As to any possible criminal violations, the Government certainly can proceed.

The Court: What about this motion for the production of documents? Is there any difficulty about that?

Mr. Vosburg: No, your Honor. I think I have satisfied every request made upon me, and counsel has only made one request to produce our books, and Mr. Hamilton says he has the books—the Government has had the books during the last two years, except [6] certain books. It seems Mr. Ham-

ilton hasn't had a chance to examine them. I have asked for the production of a letter dated September 18, 1944. I don't know whether Mr. Hamilton has that letter or not, but he has advised me he would not object to our using a copy. Otherwise, your Honor, as far as the production of documents is concerned, I have complied with and will comply with every request made by Mr. Hamilton. Mr. Hamilton has done the same with me.

The Court: How many witnesses will you have?

Mr. Vosburg: I will have just four. The case will not take very long.

The Court: There will be a jury here in the morning, and this case will follow. Anyhow, we will start in with this case and I will decide that question about a continuance, Mr. Hamilton, later. Oftentimes we can start in with a case and it opens up differently than people expect.

Mr. Hamilton: The only thing I would like to say, your Honor, is that, as matters now stand, there will be nothing I know develop during the trial of the case, with the information I now have, which would help your Honor in deciding the question at all.

The Court: Anyhow, we will hear what the plaintiff has to offer. We have to do that sooner or later anyhow. [7]

April 7, 1948, 10:00 o'clock a.m.

Mr. Hedlund: At this time I would like to present to the Court the pre-trial order which has been agreed upon between us. I might explain to your Honor that we have marked the exhibits, not

in accordance with the pre-trial but in accordance with what actually developed.

The Court: As long as you can satisfy the Reporter and the Clerk it is all right with me.

Mr. Hedlund: I think they are satisfied.

The Court: Proceed.

Mr. Vosburg: May it please the Court, I want to apologize for my physical condition. I have developed a miserable cold and am also a little hard of hearing. I might have difficulty in hearing your Honor. I am afraid I was a little bit too zealous in opposing the Government's motion for a continuance. If I had been a little more diplomatic, I would have agreed to it and possibly would feel a little better.

The Court: You have an able associate, Mr. Vosburg.

Mr. Vosburg: I know that.

The Court: He has won some very difficult tax cases here, hairline cases.

Mr. Vosburg: I don't know whether you would care to have us make a short statement or not. [8]

The Court: As you wish.

Mr. Vosburg: I think it might be helpful.

(Thereupon opening statements were made by counsel for the respective parties.)

Plaintiff's Testimony:

IRENE LAMBETH,

the plaintiff herein, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vosburg:

Q. Your name is Irene Ester Lambeth?

A. Irene Ethel Lambeth.

Q. You are the plaintiff in this case?

A. Yes.

Q. In December of 1941, where were you located? A. 1017 Southwest Sixth Street.

Q. Speak louder.

A. 1017 Southwest Sixth Avenue.

Q. What city? A. Portland, Oregon.

Q. No, I said in the spring and summer of 1941, where were you? A. In Eugene.

Q. What business were you in?

A. Restaurant.

Q. Where were you born? [9]

A. Stevensville, Montana.

Q. Montana? A. Yes.

Q. In Montana, before coming to Oregon, did you have occasion to know Dr. Stevens, or who later became Dr. Stevens? A. Yes.

Q. And A. A. Lambeth? A. Yes.

Q. You knew them as boyhood companions?

A. Yes.

Q. In October, 1941, did you have occasion to become connected with The Cozy Club?

A. Yes.

(Testimony of Irene Lambeth.)

Q. Who first made contact with you in regard to accepting a position with that club?

A. Mr. Stevens and Mr. Church, both.

Q. What was Stevens' name?

A. Dr. Paul Stevens.

Q. Paul Stevens? A. Yes.

Q. Is that the Stevens you knew when you were a young girl in Montana? A. Yes.

Q. You knew also Mr. A. A. Lambeth, I believe, in Montana? A. Yes. [10]

Q. What proposition did Dr. Stevens make to you in regard to the Cozy Club?

A. Well, when I first talked to him about it, he told me Mr. Church was going into the service, the armed service, which he later did, and that they wanted a new manager for the club. That was the first conversation about it. Then, later, I came to Portland to find out about it and entered into an agreement later on that year.

Q. Was Mr. Church that you mentioned the then present manager of the Cozy Club?

A. I think he was, yes, for several years.

Q. You came to Portland and saw Mr. Church?

A. Talked with Mr. Church, yes.

Q. Did you make any deal with Mr. Church?

A. Yes, I did.

Q. What deal did you make with Mr. Church?

A. That I would take over the club, as manager of the club, the same as he had it.

Q. You bought certain equipment?

A. Yes, that he owned.

(Testimony of Irene Lambeth.)

Q. That Mr. Church owned? A. Yes.

Q. What arrangement at that time did you make with the club towards the profit or the money that you were going to receive for operating the club? [11]

A. The profit derived from the club was my salary.

Q. What do you mean? Just tell what it was?

A. Well, from the operation—I mean by selling mixes and that sort of thing. The only remuneration from it, besides membership, was from selling the mixes over the bar.

Q. Do I express it correctly when I say you were to pay all the expenses?

A. All expenses.

Q. And to retain all the profits as your compensation for running the club?

A. Yes, that is right.

Q. The profit, as I take it, would come from what they would spend over the bar?

A. Yes.

Q. Or derive from the sale of lunches and things of that nature?

A. Yes. There was no lunches then.

Q. Then? A. No.

Q. How about membership dues? Did you become entitled to any of those?

A. No, I was not. The only time that we used membership dues was for some little remodeling for a further benefit of the club.

Q. How about initiation fees?

(Testimony of Irene Lambeth.)

A. They were included the same way.

Q. You had no interest in the initiation fees?

A. Not at that time, no.

Q. At the time you first became interested in this venture, which I believe was in October, 1941—

A. I think in September.

Q. September, 1941? A. Yes.

Q. —did you know whether or not the club was being operated as, and was, a private club?

A. Yes, it was, I believe.

Q. Where was the clubhouse? Where was it located? A. 1017 Southwest Sixth Avenue.

Q. 1017 Southwest Sixth Avenue?

A. Yes.

Q. Portland, Oregon? A. Yes.

Q. You have been handed Plaintiff's Identification No. 1. I will ask you if you know what that particular book is? A. Yes.

Q. What is it? A. Membership book.

Q. Would it also, in common terms, be called a minute book? A. Yes.

Q. That contains the official records of the incorporation and operation of the Cozy Club?

A. Yes. [13]

Q. Will you glance at it, all the way through it, and give us the last page on which there are any documents that were in there when you first became associated with the club in September or October, 1941? In other words, I want you to say what was in the book, the number of pages that

(Testimony of Irene Lambeth.)

were in the book, when you became associated with the club in 1941?

What I mean is this: Calling your attention to Page 21, was that in the minute book when you first contacted Dr. Stevens and Mr. Church?

A. Yes.

Q. What about Page 22?

A. That was there when we started.

Q. That was not in there when you became manager? A. Apparently not.

Q. Is it fair to say that all pages and all records from Page 21 forward were records that were in the book when you became associated with the Cozy Club? A. Yes.

Q. And the remaining records in that book, were they records or minutes of meetings that occurred after you became manager and operator of the Cozy Club? A. Yes.

Q. Do the rest of those minutes and documents correctly represent the transactions that they purport to represent?

A. To the best of my knowledge, they do. [14]

Mr. Vosburg: I offer Plaintiff's Identification No. 1 in evidence.

Mr. Hamilton: May I examine it a minute, please? No objection.

The Court: Admitted.

(Minute Book thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Vosburg: For the purpose of the record, when you became associated with the Cozy Club in

(Testimony of Irene Lambeth.)

September or October, 1941, what was your name?

A. Irene Roskie.

Q. How do you spell it?

A. R-o-s-k-i-e.

Q. I believe you said you first became interested in the club because of Dr. Paul Stevens coming to you and talking to you about it, is that correct?

A. Yes, that is right.

Q. Was Dr. Paul Stevens a member of the club at that time? A. Yes, he was.

Q. Do you know any other close friends associated with him in the club at that time, with Dr. Stevens?

A. Yes, a lot of them—I don't quite get the point.

Q. I will withdraw the question. After you took over the management of the club, who became President? A. A. A. Lambeth. [15]

Q. A. A. Lambeth is one of the parties that you have mentioned as knowing when you were young people together in Montana? A. Yes.

Q. Mr. Lambeth became president of the club?

A. Yes.

Q. And Dr. Stevens became what?

A. Vice-president.

Q. Did you become an important member of the club?

A. I was manager of the club, yes.

Q. Were you an officer, too? A. Yes.

Q. What was your title?

A. Secretary-treasurer.

(Testimony of Irene Lambeth.)

Q. I hand you what has been marked for identification as Plaintiff's Exhibit No. 2, which is a lease dated May 29, 1943, in which the Title & Trust Company is lessor and the Cozy Club, Inc., is lessee. I direct your specific attention to the signatures on that lease and I will ask you if you know whose signatures they are that are appended thereto?

A. Yes, A. A. Lambeth and Irene E. Lambeth.

Q. That is Mr. A. A. Lambeth's signature?

A. Yes.

Q. What is the other signature under Mr. Lambeth's signature? A. Irene Lambeth.

Q. That was under date of May 29, 1943? [16]

A. Yes.

Q. Had you married Mr. A. A. Lambeth in the period of time you became manager of the club, between then and 1943? A. Yes.

Q. Was the lease executed by someone on behalf of the Title & Trust Company?

A. Yes, it was.

Q. Mrs. Lambeth, that lease covered the premises commonly known as 929 Southwest Yamhill, did it not? A. Yes.

Q. Prior to the execution of that lease, I believe the club had been operated at 1017 Southwest Sixth? A. Yes.

Q. What caused you to move and to execute this lease?

A. The lease expired and they could not—we could not renew it at the old location.

(Testimony of Irene Lambeth.)

Q. Was this a suitable place to move the club into? A. Yes, more suitable.

Q. I believe this lease is dated the 29th day of May, 1943. Do you know about what time you actually moved from 1017 Southwest Sixth to 929 Southwest Yamhill?

A. I believe it was on the 18th day of May.

Q. Please? A. 18th.

Q. Of what year? [17]

A. 18th day of May, 1943.

Mr. Vosburg: I offer what has been marked as Plaintiff's Identification No. in evidence.

Mr. Hamilton: No objection.

The Court: Admitted.

(Lease dated May 29, 1943, Title & Trust Company and Cozy Club, Inc., thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Vosburg: When you managed the club, the Cozy Club, at 1017 Southwest Sixth, what type of liquor license did you have or what type of liquor license did the club have at that time?

A. Service license only.

Q. I beg your pardon?

A. A service license only.

Q. Did you have a restaurant license?

A. No.

Q. Just as a point of information, Mrs. Lambeth, before you can have dancing on the premises, what type of license do you have to have in connection with a liquor license?

(Testimony of Irene Lambeth.)

A. You must have a restaurant license.

Q. In other words, before you can conduct dancing, you must have a restaurant license?

A. That is right. [18]

Q. Did you have a restaurant—Did you have restaurant facilities and did you operate a restaurant at 1017 Southwest Sixth? A. No.

Q. When you moved up to 929 Southwest Yamhill, I take it that was much larger and more commodious, a much larger and more commodious clubroom, was it not? A. Yes.

Q. Just briefly—I don't want you to be too minute, but just briefly, give us a picture of the clubrooms at 929 Southwest Yamhill that you moved into at that time?

A. Well, I think the seating capacity was around 150; it had restaurant facilities—

Q. I am sorry. I didn't hear.

A. We had a seating capacity of around 150; we had restaurant facilities and a barroom, a checkroom and necessary plumbing.

Q. How about cooking facilities?

A. Yes, I said restaurant facilities, and we had a kitchen.

Q. Do you know the total area of all rooms, what your floor space was?

A. Yes, I believe it was 50 by 50, approximately.

Q. Was that on the ground floor or the second floor of the building?

A. It was on the second floor.

(Testimony of Irene Lambeth.)

Q. How did you reach the second floor?

A. By a stairway. [19]

Q. What type of door did you have on the clubroom?

A. We had two doors.

Q. The first door, what was it?

A. A swinging door, a double door.

Q. That was at the bottom of the stairway?

A. Yes, sir.

Q. As you got to the top of the stairway, what kind of a door did you have?

A. A large, heavy, bolted door.

Q. Was that door equipped with a lock?

A. Yes.

Q. How did you open the door?

A. By means of a push button on the inside.

Q. It was one of these mechanical devices where, if you press the button, they go right in and if you don't press the button, you stay out?

A. It was an electric lock and it had to be pressed by the girl who operated the door to the checkroom.

Q. When you were down at 1017 Southwest Sixth, did you have any machines such as these so-called juke boxes, anything of that nature, that played records?

A. Yes.

Q. What did you do with that machine when you moved from 1017 Southwest Sixth to 929 Southwest Yamhill?

A. I believe that machine was moved to 929 Southwest Yamhill or [20] else replaced by another one.

(Testimony of Irene Lambeth.)

Q. When you were down at 1016—1017, rather, Southwest Sixth Street, did you dance any there with that machine? A. No.

Q. When you moved to 929 Southwest Yamhill, did you do any dancing?

A. No, we were not allowed to.

Q. Why not?

A. Because we did not have the proper type of license.

Q. What kind of license did you have to have?

A. We would have to have a restaurant license to dance.

Q. When did you obtain a restaurant license?

A. It was early in the fall of 1943, I believe.

Q. Would the date, the 17th day of September, 1943, refresh your memory any?

A. Well, I believe that was the date.

Q. Prior to the 17th day of September, 1943, was there any dancing? A. No.

Q. At either 929 Southwest Yamhill or 1017 Southwest Sixth? A. No.

Q. That would cover both places during the period of time between May 1, 1943, and September 17, 1943?

A. Yes. There was no dancing.

Q. No dancing. You are sure of that? [21]

A. Yes.

Q. After September 17, 1943, what can you say as to dancing?

A. Well, after we were granted a license to

(Testimony of Irene Lambeth.)

dance, then we were allowed—Then we allowed dancing.

Q. I take it in your new facilities up there you prepared food and served food? A. Yes.

Q. You had a bar? A. Yes.

Q. Did you have a locker room?

A. We had lockers, yes, not a separate room but lockers.

Q. Was there any change in your relationship with the Cozy Club from the time you operated down at 1017 Southwest Sixth Avenue until you moved up to 929 Southwest Yamhill? I mean, was your business arrangement with the club the same?

A. Yes.

Q. At both places? A. Yes.

Q. So, is this a fair statement: At 929 Southwest Yamhill you paid the expenses and retained for your emolument the profit? A. Yes.

Q. What about the membership dues and initiation fees?

A. That money was used for remodeling the club for the members. However, they did not have enough money to do that with and I loaned them money. [22]

Q. When you were down at 1017 Southwest Sixth Avenue. when you were down on Sixth Street, did the club have any special fund of its own? A. Yes.

Q. How was that fund derived? Where did it come from? A. From membership.

Q. Membership dues and initiation fees?

A. From membership dues, yes.

(Testimony of Irene Lambeth.)

Q. When you moved up to 929 Southwest Yamhill—I believe you said that was around the 17th of May, 1943? A. Yes.

Q. What did the Cozy Club, as distinguished from you, do in regard to putting the premises in suitable condition to operate as a clubhouse?

A. They were supposed to have put the club—made all remodeling, all the decorating—The club was to have paid that. However, they did not have enough money to do that with and I advanced the money myself.

Q. Did you personally loan money?

A. Yes, I did.

Q. Did you get it all back?

A. No. The club, the Cozy Club still owes me money.

Q. Did you have occasion to do some further remodeling in the fall or summer of 1944?

A. Yes, we did. [23]

Q. When the Cozy Club was on Southwest Yamhill, do you know whether they had a separate bank account, separate and apart from your account?

A. No. I don't believe they did. The reason that I say that is that the club owed me money. As I say, I had advanced money to the club and the dues that came in was paid back to me against the money I had advanced them.

Q. Did you put the money that you received from initiation fees and dues into your general account or did you have a special account for it?

(Testimony of Irene Lambeth.)

A. No, I had a special account, my own account for that.

Q. Did you keep a separate or special account on the books for the affairs of the Cozy Club which would deal with initiation fees and dues and expenditures made in renovating and improving the premises? A. Yes.

Q. Do you have that particular account book with you? A. No, I have not.

Q. Do you know where it is?

A. The Government has it.

Q. I will ask you this: When do you last remember seeing the book?

A. Mr. Kuhn took it. He was with the Internal Revenue. He picked up the book one evening last spring.

Q. When was that? [24]

A. As a matter of fact, he picked up five books in all.

Q. Mr. Kuhn with the Federal Government?

A. Yes. He is now working for the Liquor Commission.

Q. At that time he was in what department? Treasury Department, Internal Revenue?

A. I think he was with the Treasury Department, yes.

Q. And he came and got the books from you, not only of your own operation but also the books of the Cozy Club?

A. Yes, they were all together.

Q. And you have not seen them since then?

(Testimony of Irene Lambeth.)

A. No, I have not seen any of them since then.

Q. You have seen the books of account that Mr. Hamilton, representing the Government, has in the last day returned to me as being the books that you have mentioned, have you not?

A. I can see them now, yes.

Q. You saw them in my office, didn't you?

A. Yes.

Q. Other than those two books and I believe some ledger sheets, were there other books that you are referring to?

A. Yes, there are two more.

Q. What were the other two books that have not been returned to date?

A. One of them was, I believe—I have not looked at those. One of them is '41 and '42, Cozy Club; the other one was the records of all of the Cozy Club accounts. [25]

Q. You are very positive these books were taken by Mr. Kuhn? A. Yes, sir.

Q. I believe Mr. Kuhn called at your place of business to get the books? A. Yes.

Q. What did he tell you, that he just wanted them?

A. No, he told me he wanted to examine them. As a matter of fact, he went through them that day with me and then asked if he could take them to his office and work on them, and I allowed him to do it.

Q. You said yes? A. Yes.

(Testimony of Irene Lambeth.)

Q. And you never got them back until this time?

A. No, they were never returned to me.

Q. The Cozy Club was the official name of the club, as you mentioned, I believe, in accordance with its charter. Did you and the members of the club particularly like the name? A. No.

Q. To use a vulgar expression, a colloquial expression, you thought it was sort of corny?

A. It was, and there is another Cozy Club here which is a dance club, a lonesome hours deal, so we did not like it.

Q. There is another club that goes by the name "Cozy Club"? A. Yes.

Q. What name did the club decide to use for their operations on [26] Southwest Yamhill?

A. Called it the "La Fiesta".

Q. I hand you what has been marked for identification as Plaintiff's Exhibit No. 3 and ask you if you know what that is? A. Yes, I do.

Q. What is it?

A. It is a membership book.

Q. For what year? A. '41 or '42.

Q. I beg your pardon?

A. '43—'44; '43 and '44, Mr. Vosburg.

Q. Is that list alphabetically kept?

A. Yes.

Q. I beg your pardon? A. Yes.

Q. I believe the records will show at that time that R. Lambeth was president. The R. Lambeth referred to is R. N. Lambeth, am I right?

(Testimony of Irene Lambeth.)

A. R. H.

Q. It is "R" anyway? A. Yes.

Q. He was president and I believe Mrs. Sherman was vice-president and you were secretary-treasurer? A. Yes.

Q. Do you know whether the names of those three officers appear [27] in that book?

A. I doubt it.

Q. Those are the membership other than the officers?

A. You see, the officers would not have a locker number, a membership number. The numbers are all in here, the locker numbers.

Q. One of the main purposes of that book is to identify the locker number of the members, is that correct? A. That is right.

Mr. Vosburg: I offer what has been marked for identification as Plaintiff's Exhibit No. 3 in evidence.

Mr. Hamilton: No objection.

The Court: Admitted.

(Book containing alphabetical list of membership, with locker numbers, thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Vosburg: Q. I hand you a series of cards, eight in number—I have not counted them but I think there are eight—marked Plaintiff's Exhibit No. 4 for identification, and will ask you if you will examine those cards and tell us if you know what they are.

(Testimony of Irene Lambeth.)

A. It is the 1943 roster of the Cozy Club, Inc.

Q. From glancing through those, do you know whether that is complete or not? [28]

A. I would say yes.

Q. You would say yes? A. Yes.

Mr. Vosburg: We will offer what has been marked for identification as Plaintiff's Exhibit No. 4 in evidence.

Mr. Hamilton: No objection.

The Court: Admitted.

(Ten cards containing 1943 membership of Cozy Club thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Vosburg: Q. Mrs. Lambeth, I am handing you what has been marked for identification as Plaintiff's Exhibit No. 5, which consists of a series of cards, at least twenty or probably thirty in number, bound together or, I should say, surrounded by a rubber band, and will ask you if you know what those particular documents are?

A. Yes. These are the signature cards for applications.

Q. Those could be termed applications of prospective members in the club? A. Yes.

Q. I would like for you, please, Mrs. Lambeth, to tell the Court in your own words just how membership in the club was worked, what it was composed of and all about it.

A. You mean how they gained membership?

Q. You say these are applications? [29]

(Testimony of Irene Lambeth.)

A. Yes.

Q. All right. You have a club operating and somebody makes an application. I take it you make them sign individually?

A. Yes, these are all individual signatures of the applicants.

Q. Just tell the Court, after they are signed, how you operate, what happens?

A. When they ask us to join the club—It was usually someone who had previously been in with a member of the club. That was the recommendation that we considered the best recommendation due to the fact that he had been introduced by an old member.

Q. I will ask you this: Could anybody get into the club up on Yamhill Street unless he were a member or a guest of a member?

A. None excepting law enforcement officers.

Q. What is that last?

A. Only law enforcement officers of the state.

Q. Yes, I understand. Law enforcement officers could get in.

A. Or the Liquor Commission men.

Q. Other than law enforcement officers, could anyone other than a member of the club or a guest of a member get in? A. No.

Q. The members had a right to bring guests, did they? A. Yes.

Q. After these applications were made, Mrs. Lambeth, who passed upon them during the period, say, in 1944? I believe those are 1944 applications.

(Testimony of Irene Lambeth.)

A. 1943 and '44.

Q. Who passed upon them?

A. Mrs. Sherman and myself.

Q. Who was Mrs. Sherman?

A. Secretary-treasurer at that time.

Q. Did Mr. R. Lambeth, the president, have anything to do with them?

A. During those years—

Q. I beg your pardon.

A. During these years, 1943 and 1944, Mr. Lambeth was working in the shipyards and seldom could attend meetings. However, he did when he could.

Q. Was it generally understood by the officers that you and Mrs. Sherman would process the cards? A. Yes.

Q. Tell me this: In order to first get an application in, I take it you had to be vouched for by a member?

A. You had to be introduced by a member, yes.

Q. Did everybody who was introduced by a member get into the club? A. No.

Q. Can you give the Court some idea as to the people that made applications that were or were not received? I know you can't do it mathematically but—

A. During that period of time, during the war, there were many [31] people who were rowdy and—We checked them by observation of their conduct when they were with a guest. If their conduct

(Testimony of Irene Lambeth.)

was satisfactory as a guest, they were more than likely chosen as a member.

Q. Mrs. Lambeth, I call your attention to the fact that on these application cards are a great many members? A. Yes.

Q. A great number of people who do not appear in the roster, the book which has been marked Plaintiff's Exhibit No. 3.

Is the difference between the people who made application and actually got into the roster, the difference between those figures, the people that were not admitted to the club?

A. Some of them were not admitted, and some of them were servicemen that were called away and did not come back to pick up their cards.

Q. So, the difference in number between that in the roster, Plaintiff's Exhibit No. 3, and that in the applications themselves would be the difference between—would be the people who changed their minds about joining the club?

A. Or were rejected?

Q. Or people definitely rejected by the club?

A. Yes.

Q. That is correct?

A. Yes, that is right.

Q. Mrs. Lambeth, I believe the by-laws or at least the minutes [32] in some place in our Exhibit No. 1, will show that the initiation fee for full members was \$3.00? A. Yes.

Q. Is that correct? A. Yes.

Q. During the spring—I would presume around

(Testimony of Irene Lambeth.)

January of 1944—did the Cozy Club adopt any different treatment of people that were in the military service than those that were civilians in regard to their becoming members? A. Yes.

Q. Do I make myself clear? A. Yes.

Q. All right. What new policy did you institute beginning in January, 1944, January 1, 1944, in regard to accepting members or people that were in the armed forces?

A. Changed the price of membership.

Q. I beg your pardon?

A. There was a change in the price of membership for military men; reduced it to 50 cents because they were frequently in town for just a week or two weeks, for the duration of the time they would be here. We felt it was fair to them not to charge them a full year's dues, and that is the reason for lowering the price to 50 cents for servicemen.

Q. That only applied to servicemen?

A. Yes. [33]

Q. The civilian initiation fee and dues were still \$3.00?

A. Continued to be \$3.00, yes.

Q. I notice on these applications that you have there some of them are marked "M" and some marked "C", and I note in the 1944 roster, Exhibit No. 3, some names are marked "M" and some are marked "C". Is there any significance between those initials "M" and "C"?

(Testimony of Irene Lambeth.)

A. Yes, "M" is for military and "C" is civilian.

Q. So that wherever we find an "M" after a name that is a military member? A. Yes.

Q. Or an associated or limited member and "C" refers to civilians?

A. Civilians, that is right.

Mr. Vosburg: We offer in evidence what has been marked for identification as Plaintiff's Exhibit No. 5.

Mr. Hamilton: No objection.

The Court: Admitted.

(Group of signature cards of members thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Vosburg: Q. I hand you what has been marked for identification as Plaintiff's Exhibits No. 6-A and No. 6-B and will ask you if you know what those particular documents are?

A. Membership cards for "Club La Fiesta" and "Cozy Club, Inc."

Q. What is No. 6-A? [34]

A. A membership card, also.

Q. What year? A. 1944.

Q. I beg your pardon? A. 1944.

Q. Will you look at the card again, please, No. 6-A? A. 6-A is '43. I am sorry.

Q. What about 6-B? A. 1944.

Q. Is it a fact, Mrs. Lambeth, that the reason, as far as 6-B is concerned, we had to use this

(Testimony of Irene Lambeth.)

card which had been issued at one time because we could not find any new cards for samples?

A. Yes.

Q. As a matter of fact, what can you say, generally speaking, as to what happened to the records of the Cozy Club or the La Fiesta Club, if you please, subsequent to, say, January 1, 1945, or to the summer of 1945?

A. Those records—When I moved from the La Fiesta Club to the King of Clubs, I took those records with me. Last fall, in September, my father was ill and I was home and the records were moved, and where they have gone I just don't know. Some of them were destroyed.

Q. You will have to concede, I take it, your records are very incomplete?

A. Yes. Probably I could find a few of them if I went through [35] boxes of things.

Q. Mrs. Lambeth, during the period that you were up on Southwest Yamhill, 1943 and 1944, what can you say as to who could or could not get in those clubrooms?

A. Club members and their guests were allowed only.

Q. How did you keep the other people out?

A. We had a locked door. We just didn't allow them to come in without a membership card.

Q. Was that a rule that was rigidly enforced?

A. Yes.

Q. What type of license did you have from the

(Testimony of Irene Lambeth.)

Oregon Liquor Control Commission, on Yamhill Street?

A. A service license and a restaurant license.

Q. And a restaurant license? A. Yes.

Mr. Vosburg: Before I forget it, may I offer what has been marked as Plaintiff's Exhibits for identification 6-A and 6-B in evidence.

Mr. Hamilton: No objection.

The Court: Admitted.

(Sample membership card, "Club La Fiesta", thereupon received in evidence and marked Plaintiff's Exhibit No. 6-A.)

(Sample membership card, "Cozy Club, Inc.", thereupon received in evidence and marked Plaintiff's [36] Exhibit No. 6-B.)

Mr. Vosburg: Q. Exhibit No. 6-B does not have a locker number or a date of expiration. Normally those are on the cards, are they not?

A. Yes. They are filled in.

Q. Directing your attention to my former question, in November or December, 1944, you became involved in trouble with the Oregon Liquor Control Commission?

A. I believe it was in December.

Q. December, 1944? A. I think so.

Q. I believe you said you had a service license and a restaurant license?

A. Service license and restaurant license, yes.

Q. Are those normally the type of licenses used by people that cater to the public at large?

A. Yes.

(Testimony of Irene Lambeth.)

Q. Assuming that you were operating a private club, would that be the type of license you would need? A. No.

Q. What happened to you in December or thereabouts of 1944?

A. We were given a ticket from the Liquor Commission for refusing service to persons entitled to service.

Q. Do you know how that happened to come about, that you got a ticket? [37]

A. Yes, the girl in the checkroom refused to admit a fellow who did not have a membership card, and it happened to be a stool pigeon for the Liquor Commission.

Q. When you say "a ticket", you are referring to something like a policeman gives you for parking? A. Yes, exactly.

Q. And the Liquor Commission, if you violate their regulations, they give you a ticket, too?

A. Yes, they do.

Q. As I take it, usually the person that is in attendance at the door would know the Liquor Commission men and let them in?

A. We know most of them.

Q. But this girl made a mistake, is that right?

A. Made a mistake. She didn't let the Liquor Commission man in.

Q. Why wouldn't she let him in?

A. Because he wasn't a member.

Q. Couldn't show a card? A. No.

Q. She did not know him? A. No.

(Testimony of Irene Lambeth.)

Q. Then what happened? A. He left.

Q. After that what happened?

A. Then we were issued a ticket, a violation ticket. [38]

Q. Then what happened?

A. Then we were closed for thirty days by the Commission.

Q. How long were you closed?

A. I believe it was twenty-seven days, I think.

Q. I beg your pardon?

A. As a matter of fact, the license was revoked. It was not—It was just revoked, rather than having a ten-day suspension.

Q. As I understand your testimony here—Tell me if this is a fair statement: Your license was revoked by the Liquor Control Commission for the reason that you were operating a private club whereas the license you had would compel you to cater to the public and to take whoever presented themselves in an orderly and gentlemanly manner, is that right? A. Yes.

Q. After they canceled your license, suspended it, what happened to the Cozy or the La Fiesta Club?

A. There was nothing more to it. However, we tried on a later occasion to get the license back or to get a club license, but it was refused again.

Q. That was in the spring of 1945. After you closed up, the Cozy Club or the La Fiesta Club made one further effort to try to get a private club license? A. Yes, we did.

(Testimony of Irene Lambeth.)

Q. Were you successful or unsuccessful?

A. No, we were unsuccessful. [39]

Q. And I take it that was the end of the Cozy Club?

A. That was the end of the Cozy Club.

Q. I think the records which the Government will introduce will show that you were closed for a period of time, approximately January 20, 1945, to February 15, 1945?

A. I think that is about right.

Q. You were closed because your license was canceled?

A. Yes.

Q. Because you were operating as a private club?

A. Yes.

Q. What happened to the assets that belonged to the Cozy Club?

A. There were no assets. They were in debt.

Q. Were they indebted to you?

A. Yes, they were.

Q. How about the lease? Was it in their name?

A. Yes, it was. Yes, they would have been obligated for the lease had I not continued the operation.

Q. Did you take over the lease?

A. Yes.

Q. Generally, you continued to operate as an individual from then on, is that right?

A. Yes, I did.

Q. The Cozy Club or the La Fiesta Club was no more?

A. No.

Mr. Vosburg: May it please the Court, I would call a witness [40] out of turn, a witness who has

(Testimony of Irene Lambeth.)

to attend a funeral this afternoon, and I am going to defer any further questions of Mrs. Lambeth so as to give counsel a chance to cross-examine her now at this time, so I can still have time to call this other witness, if that is agreeable to the Court.

The Court: Maybe he does not want to cross-examine her now. Maybe he wants her to finish her testimony.

Mr. Hamilton: I would prefer to hear her out, but if you want to call the other witness it would be all right with me.

Mr. Vosburg: I do not want to commit myself, but I believe that is all the questions I wish to ask Mrs. Lambeth at this time. If I have overlooked something, I might ask the indulgence of the Court, but I have no further questions on direct at this time.

Cross Examination

By Mr. Hamilton:

Q. Mrs. Lambeth. I believe you testified you became associated with the Cozy Club in September, 1941? A. Yes.

Q. Do you recall when it was you became secretary-treasurer of the club?

A. It was some time in September or October; the exact date I don't know; in the early fall.

Q. You have been handed Plaintiff's Exhibit No. 1. Mrs. Lambeth, will you turn in that book to the minutes of the special meeting [41] of the members of the Cozy Club on October 13, 1941?

A. October 13, 1941?

(Testimony of Irene Lambeth.)

Q. Yes. A. Yes, sir.

Q. If you will look in those minutes, down about the fourth paragraph, I will ask you whether or not those are the minutes of the meeting at which you were elected secretary-treasurer of the club? Is that correct? A. Yes.

Q. At that time I take it you knew that the Cozy Club was a non-profit corporation of the State of Oregon? A. Yes, sir.

Q. Were you at that time familiar with the Articles of Incorporation of the club?

A. I believe that I was, yes.

Q. You were familiar with the bylaws?

A. Yes.

Q. I will ask you to turn now in the book to the Articles of Incorporation of the Club.

A. All right.

Q. Will you please read Article II?

A. "The object, business or pursuit of said corporation shall be the promotion and legitimate regulation of trade or commerce or any branch thereof, and/or the promotion of better acquaintance and/or closer association between those engaged therein, and the [42] development of the physical or mental capacities of its members or others."

Q. On direct examination, Mrs. Lambeth, you testified, I believe, that you doubted if your name and the names of the other officers of the corporation would be in the list of members—

A. The roster.

Q. —because you said you would not have a

(Testimony of Irene Lambeth.)

locker number. A. No, we would not.

Q. What do you mean by that?

A. The officers would not have a locker number.

Q. What kind of a locker?

A. A liquor locker.

Q. All other members had lockers?

A. All other members were assigned locker numbers. There were not that many lockers, no, but that was their identification number on their bottles that was placed in the storage space that we call lockers.

Q. It appears, then—

A. In other words, they were all set along on a shelf; they were not lockers; there were not that many lockers but that was the identification number for the member.

- Q. It appears from your testimony, then, that everybody in the club consumed alcohol, is that correct? It seems to have been essential that everybody have liquor, is that right?

A. Whether everybody consumed alcohol or not I don't know. [43]

Q. That seems, however, to have been the principal purpose of the club at 929 Southwest Yamhill?

A. Not necessarily. There were restaurant facilities, too. Some people like to eat. Besides, we had social parties and activities.

Q. I see that the objects of the corporation which you just read specify one of the purposes of it is the development of physical and mental capacities of the members. A. Pardon?

(Testimony of Irene Lambeth.)

Q. One of the purposes of the corporation is, as the Articles say, "the development of the physical or mental capacities of its members or others."

Was any of that ever attempted, outside of dancing or consumption of alcohol?

A. Yes. We had lots of other activities, I mean, such as golf and that sort of thing.

Q. What?

A. Golf matches between the members.

Q. You had golf matches?

A. Yes, we had golf matches and bowling matches. I mean they were all—by the club, yes.

Q. Were those golf matches and bowling matches conducted by the club as such?

A. They were promoted by the club, yes.

Q. Promoted by the club? [44]

A. Yes, and its members.

Q. How many golf matches do you think the club promoted?

A. Oh, I would say very many, yes; lots of them.

Q. Very many? A. Yes.

Q. How many members participated?

A. About the number, I couldn't say.

Q. I will ask you to turn to the bylaws of the Cozy Club which were adopted on December 20, 1936.

A. September, did you say?

Q. December 20, 1936. Do you find those? They should be in there.

The Court: Come up and show her.

Mr. Vosburg: In 1946?

(Testimony of Irene Lambeth.)

Mr. Hamilton: 1936.

A. 23rd of December, 1936?

Q. I direct your attention, Mrs. Lambeth, to Paragraph III. Will you please read Paragraph III to the Court.

A. "The secretary shall be the custodian of the minutes of the club and shall keep correct minutes of all proceedings and enter the same in a book to be kept by him for that purpose, and shall have custody of all reports of committees and all proceedings of the club."

Q. From October 13, 1941, until the club dissolved, you were secretary-treasurer of the club, is that correct? [45]

A. No. ?

Q. You were not? You did become secretary?

A. I was an officer of the club all the time but not always secretary.

Q. You became secretary-treasurer on October 13, 1941. When did you cease to function in that capacity?

A. I will see.

The Court: What do the records indicate? Do you have any information about it?

Mr. Hamilton: I thought, your Honor, that she was secretary-treasurer until it was dissolved.

Mr. Vosburg: The record will speak for itself.

A. Yes.

Mr. Hamilton: Q. You were secretary-treasurer of the club during the period involved in this lawsuit, were you not?

A. Yes.

Q. You were? A. Yes.

Q. You have testified that the minute book that

(Testimony of Irene Lambeth.)

you have, Plaintiff's Exhibit No. 1, correctly records the proceedings of the club, after you assumed the office of secretary-treasurer. You testified to that on direct examination. That is right, isn't it?

Mr. Vosburg: May it please the Court, she had not testified to that. She just testified that this record in these minutes [46] was true, not that they represented all the acts of the club, but that they represented her minutes, minutes that she made, and I object to the form of the question that counsel has asked. It puts a very much broader interpretation on her answer than what she actually intended to convey.

(Question read.)

The Court: She may answer that.

A. I really don't know what you want me to answer. Will you ask me again?

(Question read.)

A. To the best of my knowledge.

Mr. Hamilton: Q. I direct your attention further to Paragraph VIII of the bylaws of the club.

A. The last one I had?

Q. The one you were reading from.

A. Yes, Paragraph VIII?

Q. Yes. Would you please read that to the Court, and speak slowly so the Reporter can get it.

A. "Applications for membership shall be filed with the secretary. The officers of the club shall investigate the desirability of such applicants for

(Testimony of Irene Lambeth.)

membership and if a majority of the officers of the club shall vote for the election of an applicant, he is thereby declared a member of the club. Upon being elected to membership, each applicant shall be permitted to sign the roll of membership and pay the initiation fees prescribed.” [47]

Q. Now, Paragraph IX, I would like you to read from that, starting with the first sentence and down to “provided, however,”. Start reading the first sentence.

A. “All reputable white persons of good moral character shall be eligible to membership in this club, and shall be elected thereto on application in such manner as may be provided from time to time by the board of directors.”

Q. That is enough. According to the bylaws of the club, in order to become a member a person had to make application for membership, file it with the secretary-treasurer—who, during the period of this lawsuit, the time involved in this lawsuit, was yourself—the officers were supposed to investigate the person, and then the officers had to vote on his election, isn’t that right? According to the bylaws of your club that was the procedure you had to go through to elect a member?

A. Yes, that is true. However, during—

Q. Just a minute. That is true, isn’t it?

Mr. Vosburg: I think the witness should be permitted to explain her answer.

The Court: Not until she has answered the question.

(Question read.)

(Testimony of Irene Lambeth.)

A. That was the normal procedure.

Mr. Hamilton: Q. According to Paragraph III of the bylaws, which you previously read, you were the custodian of the minutes of the club, and you had the duty of keeping the minutes of all [48] the proceedings of the club, is that correct? That is what it says, isn't that right?

The Court: All right, if it says that.

Mr. Hamilton: Q. Now, I will ask you, Mrs. Lambeth—You have the minute book of the club before you for the period after you became secretary?

A. Yes.

Q. Will you point out to me to the Court, please, the action of the board of directors of the Cozy Club electing a person or persons to membership in the club? Point out the minutes. Are there any?

A. They are not in this book, no. However, there are—

Q. Isn't that the minute book of the Cozy Club?

A. Yes, it is.

Q. They are not in there?

A. I don't understand your question.

Q. I say, that is the minute book of the Cozy Club; that is the book in which you kept the minutes, but there are no minutes in there concerning the action of the board of directors?

A. You mean upon each individual member?

Q. Yes. A. No. That is not customary.

Q. It is not? A. No.

Q. On direct examination you testified that there

(Testimony of Irene Lambeth.)

was no dancing [49] at 929 Southwest Yamhill before September 17, 1943.

A. Until the license was granted by the Liquor Commission. I believe that was the date.

Q. Just what do you mean by "license granted by the Liquor Commission"?

A. We had a service license, and that did not entitle you to dancing. We applied for a restaurant license, which gives the privilege for dancing facilities. I don't remember which date it was granted or what date it was granted to, but we did start dancing. Prior to that time we had tables on the dance floor. It was not used.

Mr. Vosburg: May I ask counsel if he has the date that the Liquor Commission issued this license? I think that will answer the question.

Mr. Hamilton: I do not have it.

A. I do not remember just when it was.

Mr. Hamilton: Q. Up until that time—I have it as September 17, 1943. Up until that time there was no dancing, you say, at 929 Southwest Yamhill?

A. No.

Mr. Vosburg: If your Honor is going to recess at twelve, might I suggest that we interrupt at a quarter to twelve to allow this other witness to testify?

The Court: Yes.

Mr. Hamilton: Q. Mrs. Lambeth, you have been handed a book [50] of ledger sheets, the book having been marked for identification as Defendant's Exhibit 8. A. Yes.

(Testimony of Irene Lambeth.)

Q. Do you recognize that book? A. Yes.

Q. Will you tell the Court what it is?

A. Bookkeeping record.

Q. Of what?

A. Of the Cozy Club, of the operation of the Cozy Club.

Q. Which would be the same as the La Fiesta Club? A. Yes, sure.

Mr. Hamilton: I offer that in evidence.

Mr. Vosburg: I do not think this is the proper time, but I waive any objection. Whatever procedure your Honor wants to adopt is all right with me.

The Court: Admitted.

Mr. Vosburg: No objection.

(Book containing record of disbursements, Cozy Club, thereupon received in evidence and marked Defendant's Exhibit No. 8.)

Mr. Hamilton: Q. I direct your attention to the entry in that book—

The Court: It has been marked Defendant's Exhibit No. 8.

Mr. Hamilton: Q. I direct your attention to the disbursements for the week January 25 to January 30, 1943. Will you turn to [51] that? Do you find it? Would you please state to the Court what Item 11 shows? A. 11?

Q. Yes, the eleventh item in the disbursements.

A. Wax.

Q. How much? A. \$8.25.

Q. Will you please turn to the record for the

(Testimony of Irene Lambeth.)

week of May 22nd to May 31, 1943? A. Yes.

Q. Will you please read Item 9 to the Court.

A. Floor wax.

Q. Floor wax, how much? A. \$9.93.

Q. That is Item 9? That is floor wax?

A. Yes.

Q. Please read Item 11 to the Court.

A. Dance wax, \$3.58.

Q. I direct your attention to the week July 7th to 12th, 1943. A. All right.

Q. Read the item— A. 7th to 12th?

Q. Yes. July 7th to 12th. Do you have that?

A. No. July 1st to 10th and July 12th to 17th.

Q. On the sheet covering July 1st to 10th, what does Item 8 [52] say?

A. That is not the one you are looking for.

Q. Turn to July 12th to 17th.

A. I have it before me.

Q. Read Item 12. A. Loan.

Q. What? A. Loan.

Q. Is there an item that says "Dance wax"?

A. Yes.

Q. \$3.80? A. \$3.80, yes.

The Court: Let Mr. Vosburg put on his other witness now.

(Witness temporarily excused.) [53]

MRS. EDITH L. DECK

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vosburg:

Q. Your full name?

A. Mrs. Edith L. Deck,

Q. Is your husband named Russell?

A. Russell K.

Q. Do you know when, approximately, you and your husband first became members of the Cozy Club?

A. I would say about 1941, I guess. I don't remember exactly.

Q. When you first became members of the Cozy Club, the clubrooms were at 1016 Southwest Sixth?

A. 1017 Southwest Sixth.

Q. 1017 Southwest Sixth? A. Yes.

Q. Have you been a member continuously since that time? A. Yes, I have.

Q. That is, up until it blew up in 1945?

A. Yes.

Q. Will you tell the Court, please, as to whether or not in its operations and particularly during the period from April 1st or May 1st, 1943, which was approximately half a month before you moved to 929 Southwest Yamhill, from that date up until September [54] 1, 1944, do you know who could get into the clubrooms?

A. Only those who were members or those who

(Testimony of Mrs. Edith L. Deck.)

made application to become—that is, those who applied for membership.

Q. Who were guests?

A. Guests could come in if they were brought in by a member.

Q. Particularly directing your attention to 929 Southwest Yamhill, could anyone get into the club-rooms or be permitted in there who was not a member or a guest of a member?

A. I would say no.

Q. Your answer is no? A. Yes.

Q. Have you ever had any occasion to see people try to get into the clubrooms that were turned away? A. Very often.

Q. Was that a fairly common occurrence?

A. I would say it was during the wartime.

Mr. Vosburg: You may cross-examine.

Cross Examination

By Mr. Hamilton:

Q. You became a member in 1941?

A. We were members of the club previous to the time I think that Mrs. Lambeth took it over.

Q. Do you remember what year you became a member?

A. I don't remember, exactly. I would say about 1941 or 1942, somewhere along in there. [55]

Q. Who proposed you for membership?

A. Well, we applied for it ourselves.

Q. You applied for it? A. Yes.

Mr. Hamilton: That is all.

(Testimony of Mrs. Edith L. Deck.)

Redirect Examination

By Mr. Vosburg:

Q. Your husband is sitting in the back of the courtroom here? A. Yes.

Mr. Vosburg: That is all.

(Witness excused.) [56]

IRENE LAMBETH,

the plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

Cross Examination (Continued)

By Mr. Hamilton:

Q. Mrs. Lambeth, I wasn't sure on cross examination what you said about the music machine you had at 1017 Southwest Sixth—on direct examination, I mean. Was that moved down to 929 Southwest Yamhill?

A. No—Well, I don't know if the same machine was moved or not.

Q. However, a music machine was moved in there? A. Yes.

Q. The music machine was in there from May 19th on—whenever you moved over, it was in there?

A. Yes, they always had a juke box.

Q. Yes. You have the ledger for 1943. Will you turn to the week January 9th to January 16, 1943? A. Yes.

Q. Please read Item No. 10.

A. January 9th to January 16th?

Q. Yes. A. "New Year's advertising."

(Testimony of Irene Lambeth.)

Q. How much? A. \$15.00.

Q. What kind of advertising was that? [57]

A. What kind of advertising?

Q. Yes.

A. I don't exactly remember but I believe it was—I really don't know but probably invitations. I mean it was printed advertising; probably invitations or cards, I don't know.

Q. Directing your attention to February 22nd to 28th—

Mr. Vosburg: What year?

Mr. Hamilton: 1943.

A. 22nd and 28th?

Q. Yes, 1943. A. All right.

Q. Will you read Item No. 8, please?

A. "Advertising and Paper."

Q. How much? A. \$2.50.

Q. The week of March 15th to 22nd, 1943, Item No. 10. A. "Advertising."

Q. The week of July 12th to 17th, 1943.

A. July 12th?

Q. Yes. A. Yes.

Q. Item No. 9.

A. "Advertising, \$15.00." May I explain that?
The Court: Yes.

A. Probably the Firemen's Benefit Association or one of the [58] various organizations, the Railroad Brotherhood, or some sort of thing of that nature, which we have frequently; I mean, almost every month they want you to donate for this or donate for that. We had a lot of that where we donated an "ad." I could show you—

(Testimony of Irene Lambeth.)

Mr. Hamilton: Q. You donated an "ad"?

A. That is right.

Q. What do you mean by that?

A. Well, for instance, the Railroad Brotherhood Association was putting on a campaign to raise some money, they will come out with a paper or a magazine or pamphlet of some kind and solicit the various clubs and businesses to give them an ad, which is practically a donation. It certainly does no one any good.

Q. You would put the name of your club in their paper, whatever it is?

A. Yes, and I have copies of lots of those that says "Club Members Only." That is only one example. There are numerous of those agencies that have done that.

Q. Directing your attention to the week of August 13th to 20th, 1944,—

A. August 13th to 20th?

Q. 1944. A. All right.

Q. —please read Item No. 3.

A. "Highway sign." That is a company, however.

Q. What? [59]

A. The Hi-Way Sign Company.

Q. How much money? A. \$169.00.

Q. That was for a Neon sign outside the club-rooms? A. Yes, right.

Q. The Bailiff has handed you Defendant's Exhibit No. 9 for Identification. I will ask you if you recognize that book? A. Yes.

(Testimony of Irene Lambeth.)

Q. Will you please tell us what it is?

A. It is the bookkeeping book for 1944.

Q. Part of 1944?

A. Part of 1944, apparently, and 1945.

Q. For the La Fiesta Club? A. Yes.

Mr. Hamilton: I offer that in evidence.

Mr. Vosburg: No objection.

The Court: Admitted.

(Account Book, La Fiesta Club, thereupon received in evidence and marked Defendant's Exhibit No. 9.)

The Court: It is about 12:00. I would like very much, without rushing anybody, to get through with this case today. We will resume at 1:30 to make sure.

(Thereupon a recess was taken until 1:30 o'clock p.m.) [60]

Court reconvened at 1:30 o'clock p.m.

IRENE LAMBETH.

plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

Cross Examination (Continued)

By Mr. Hamilton:

Q. Mrs. Lambeth, you have before you Defendant's Exhibit No. 9, which is the book of the La Fiesta Club for part of the year 1944. I will ask you to turn to the month of October, 1944. I believe it is the first one in there. A. Yes.

(Testimony of Irene Lambeth.)

Q. Do you find any items listed there under the description of "Advertising"?

A. Advertising and supply, yes.

Mr. Vosburg: How much, please?

Mr. Hamilton: Q. There are four items, aren't there? Four items totaling \$55.00?

A. Not on this page that I can see.

Mr. Hamilton: May I approach the witness, your Honor?

The Court: Yes.

Mr. Vosburg: Talk just a little bit louder, Mrs. Lambeth. A. It is not my bookkeeping.

Mr. Hamilton: Q. Do you find listed there four items in the amount of \$55.00?

A. Yes, one for the Woodmen of the World, one for "Sportsmen."— [61] Those were donations I was mentioning a while ago. Yes, \$55.00 total.

Q. For the month of November, 1944—

A. Yes.

Q. —under the same heading, "Advertising," do you find anything listed there and, if so, give me the total? A. \$154.30.

Q. And for December, 1944?

A. Yes, \$55.45. However, these are all listed separately. It is not all advertising.

Q. There are six items there? A. Yes.

Q. In January, 1945?

A. Yes, There are three.

Q. Totaling \$63.07? A. It is not totaled.

Q. Then, in February, 1945, was the club closed?

A. It was closed in the latter part of January and the first part of February.

(Testimony of Irene Lambeth.)

Q. Then I will skip that. (Exhibit No. 8 handed to the witness.)

If you will turn to the week of September 26th to 30th, 1943— A. Yes.

Q. —you have a page opposite “Disbursements,” which I believe is a page which would cover receipts. Down at the bottom, Item [62] No. 4, will you read that to the Court. A. Cover charge.

Q. How much? A. \$205.00.

Q. Turn to the week October 24th to 31st, 1943.

A. October what?

Q. October 24th to 31st.

The Court: What was that, \$205.00?

Mr. Hamilton: Cover charges, yes.

Q. Now, in the same place, opposite the “Disbursements” page, would you read Item No. 2?

A. “Cover charge, \$220.00.”

Q. Now, turn to the week November 21st to 30th, 1943. A. November when?

Q. 21st to 30th? A. Yes.

Q. Read Item No. 4.

A. “Cover charge, \$245.00.”

Q. Turn to the week December 19th to 31st, 1943— A. All right.

Q. —and read Item No. 1.

A. “Cover charge, \$243.00.”

Q. And No. 2? A. “\$135.00, Christmas.”

Q. And No. 3? [63]

A. “New Year’s Eve, \$213.80.”

Q. That is all for that purpose at this time. I realize you cannot give an exact answer to this

(Testimony of Irene Lambeth.)

question but approximately how many meetings of the board of directors were held between October 31, 1943, when you became secretary, and September 18, 1944?

A. Are you talking about our weekly meetings?

Q. No, I am talking about meetings of the board of directors of the Cozy Club?

A. Well, I don't know. We had them whenever it was convenient.

Q. Do you have any idea how many you had?

A. Well, I would say once or twice a week.

Q. Of the board of directors? A. Yes.

Q. You, as secretary, kept the minutes of those meetings? A. No, I didn't. I had—

Q. You kept some minutes, didn't you, minutes of some meetings? A. Yes, I did.

Q. All the records you did keep are in that minute book which is in evidence as Plaintiff's Exhibit No. 1?

A. You mean the record we kept of them?

Q. Yes.

A. They are in the book, yes. We did not have an official meeting every time the board of directors got together. Those were all meetings that were held in the attorney's office and our [64] other meetings were held always in the club itself.

Q. Those were always held in the attorney's office?

A. All of those were held in the attorney's office, yes, or else on the premises. I think the minutes will tell you where they were held, but usually in

(Testimony of Irene Lambeth.)

the office. Our meetings when we decided on members and all that sort of thing were held—were in our office at the club.

Q. Those were the only kind of meetings held in the club office. Is it your testimony that any meeting, other than a meeting to elect members, was held in the office of your attorney? Is that right?

A. Most of those meetings—As I say, it will tell you on the minutes, but, as I remember, most of them were held in the attorney's office. However, I think on one or two occasions that they were held in the clubrooms.

Q. You testified some time ago that your name and the names of the officers would not be in the roster of the club membership?

A. Would not be shown as a member.

Q. If a person were a member and did not have a locker number, do you have any record of his being a member?

A. Would not be any members except that did not have locker numbers or identification numbers—Maybe that would make it clearer to you. Identification numbers other than the three officers—

Q. What do you mean, "identification numbers"? [65]

A. It is the same thing as what I am talking about, a locker number.

Q. The same as a locker number?

A. Yes. It is a means of identifying your bottle, if it was on a bottle, or a means of identifying

(Testimony of Irene Lambeth.)

a parcel that they had checked if there happened to be a parcel checked in the checkroom.

Q. But if a person were a member but also did not have a locker, then the club had no record of his membership, is that right?

A. Well, I imagine there would be plenty of evidence that they were members.

Q. The club had no record, then; how could you tell if a person was a member?

A. There was only three of us, and we could remember that—president, vice-president and secretary-treasurer. Actually, I don't know if their names are in the book but I doubt it because of the fact—

Q. But every other member had a locker number? A. Yes.

Q. During the period covered by this lawsuit, at the time of the war, could you give us any estimation as to the number of soldiers and sailors who enjoyed the facilities of the club? Were they numerous? Did you have many of them?

A. Yes, we had quite a few.

Q. Quite a few sailors and soldiers? [66]

A. Yes, they are marked "Military" members in the membership book.

Q. You testified that the club adopted a different policy as to those people. In other words, they reduced the membership dues to 50 cents.

The Court: What do you mean by "dues"?

Mr. Hamilton: That is my error. Reduced the membership fee to 50 cents.

(Testimony of Irene Lambeth.)

The Court: Were there monthly dues?

A. Yearly.

Mr. Hamilton: Q. Yearly? A. Yes.

Q. In the amount of \$3.00 for civilians and 50 cents for military personnel, or anyone in uniform. You testified that the reason you reduced the membership fee to military personnel was that they were in town only a week or two, is that correct?

A. Some of them were in town only a few weeks; others were in town longer.

Q. Yes. Some would be in town maybe only a few days? A. That is right.

Q. How did the club handle their memberships?

A. In what respect?

Q. Well, how were they to become members? Suppose a sailor was in town for a week, how would he become a member?

A. Well, more of them than not were introduced either by the [67] military police here in town that used to give them a card and send them to our place because they felt they would be well taken care of and not robbed—

Q. Give them what kind of a card?

A. A guest card. The military police did that for us.

Q. The military police would distribute guest cards of the Cozy Club?

A. They gave out some guest cards, yes.

Q. What happened then?

A. What do you mean, what happened then?

Q. How did one become a member? By having a guest card?

(Testimony of Irene Lambeth.)

A. No, he didn't. They were introduced that way to us.

Q. And then what happened?

A. Then they made application for membership just like anyone else would.

Q. These soldiers would be coming in all the time, every day, during the whole period of this lawsuit, the period covered by this lawsuit?

A. Well, I imagine there were sailors and soldiers probably around the place every day during that period, yes. All the young men were in the service at that time.

Q. Even though the soldiers and sailors would only be in town for a few days or maybe a few weeks, did the board of directors investigate the men's character and—

A. We could investigate them only to the extent of their conduct [68] and the fact that they were in uniform was a very good recommendation.

Q. How many times during this period would you estimate the board of directors met and passed on applications of a soldier or a sailor?

A. Practically every morning in the world we did that.

Q. The board of directors was meeting every morning and passing on applications of soldiers?

A. Mrs. Sherman and I were there every morning, yes, and we had numerous applications, as you can tell by the number of them.

Q. If a sailor came into town and he was not known by anybody, not a single member of the

(Testimony of Irene Lambeth.)

club, by nobody in this town, a member of the military police would give him a guest card?

A. No. You misunderstood me. I said on occasions the military police had recommended our place to them and given them a guest card whereby we met them at the door.

Q. Your testimony was the military police would distribute guest cards.

A. Some of the military police would give guest cards to some of their buddies, yes.

Q. A soldier getting one of these, then, if he was not known by any member of the club, would take that guest card up and stay there for an hour or so perhaps and be eligible for membership?

A. When he brought a guest card to the door, if he wanted to become a member, he would still have to make application for [69] membership like any other member did.

Q. All he would have to do to become a member would be to take that guest card that had been given to him by a member of the military police to the door and make application for membership and the next morning the board of directors would meet?

A. If his conduct under his guest card was all right, we would accept him, if he minded his own business, as long as he was a nice fellow—I mean, apparently,—and conducted himself in a nice manner; the fact that he had a uniform, as I stressed before, was a recommendation.

Q. Was it necessary that a soldier or sailor be

(Testimony of Irene Lambeth.)

vouched for by a regular member? A. Yes.

Q. Who would do that?

A. He would be vouched for before he was ever given a card; I mean, whoever give him the card would vouch for him by giving the card.

Q. You testified a member of the military police would give him a card.

A. These boys were all members of the club. I can show you probably twenty.

Q. Was it the practice of the military police to hand out cards?

A. No, I didn't say that. Don't misconstrue it. I said some of them—That was their policy. They also gave cards to the Aero Club and some of the other clubs, too. [70]

Q. The Aero Club?

A. Yes. Officers were allowed there. That was for officers only.

Q. On January 3, 1944, at a special meeting of the board of directors, it was decided it would be necessary to obtain new quarters for the club, or to expand their facilities, isn't that correct? A special meeting of the directors—

A. At what time, please?

Q. January 3, 1944?

A. I can't say. I don't remember.

Q. It is in the minute book.

A. Well, it is there, then.

Q. It is in Plaintiff's Exhibit No. 1, and it was decided "On motion duly made, seconded and unanimously carried, the dues of the club members for

(Testimony of Irene Lambeth.)

the first six months of 1944 were fixed at \$3.00 per person and the secretary-treasurer was instructed to collect said dues, same to be held in a special fund."

You were the secretary-treasurer. Can you tell the Court the amount of dues you collected?

A. I don't have—I don't know exactly the amount of dues, no.

Q. How many members of the club were there at that time, approximately?

A. I can't tell you. If I can see the books, I can tell you. I mean, my memory does not serve me back that far. [71]

Q. You do not recall at all how much money you collected in that special fund?

A. No, I don't because—I mean, it was used for a purpose and I don't remember at any one time how much we did have. However, there is a record of it there. You have a record of it somewhere there.

Q. In any of the exhibits here?

A. In the books there is a record of it.

Q. In what club books?

A. In the Cozy Club Books.

Q. Any one that is here in evidence?

A. No, I don't see it. There was a record of all of it kept in one of the books that the Government had, that they examined.

Q. It is not here in this courtroom?

A. I don't see it here, no, now.

Mr. Hamilton: I believe that is all.

(Testimony of Irene Lambeth.)

Redirect Examination

By Mr. Vosburg:

Q. As I understand it, if you had the account book of the Cozy Club, the one that contained the deposits for initiation fees, you could tell exactly how much money you had collected in any one year?

A. Yes, but I think it could be figured out from these books.

Q. You could figure it?

A. I think I could. [72]

Q. It is just a question of accounting?

A. Yes.

Q. If you had these books, you could just point to the item?

A. Yes. The disbursement of the money and everything was there.

Q. Counsel had you read several items in the book, the cover charge so much for each week or month?

A. Yes.

Q. Just exactly what was that? What does that charge cover?

A. The cover charge was for more than two guests. I mean, we got to the point where there were so many members bringing more than two guests—would bring three or four or five guests—and we charged the guests a cover charge, the extra guests.

Q. But no member of the club paid a cover charge?

(Testimony of Irene Lambeth.)

A. No, unless they would be paying for their friends that they were bringing in.

Q. If they brought guests, they paid a cover charge on the guests only?

A. They were allowed two guests and other than that they had to pay a cover charge.

Q. On any over two guests? A. Yes.

Q. Wasn't that only on certain specified days?

A. Friday and Saturday night, busy nights.

Q. The cover charge items would be the amounts collected on guests brought by members, over two in number? [73] A. Yes.

Q. In regard to this advertising, you have, at counsel's interrogation, pointed out specific sums here and there spent for advertising. Just what was the nature of that advertising?

A. Well, the advertising for one thing, a reminder to the members. We advertised any special party or any special event that we were having.

Q. Was there anything in your advertisements that would indicate to whom you were addressing your communication? A. Yes, the ad.

Q. What was that?

A. "Members and guests only" on almost every ad.

Q. That is, all of your advertisements?

A. Yes.

Q. In all of your advertisements you would say, "Members and guests only" or words to that effect?

(Testimony of Irene Lambeth.)

A. "Members and guests invited" usually is the way it was worded.

Q. I take it you would use a certain advertising medium to advise your members of special social events?

A. Many times advertising was by ticket. We would send out tickets to them for special occasions. Many times we typed out letters to them—all different kinds of advertising, as far as that goes. All of that advertising listed there would include all of our stationery, would include all of our membership cards and anything that we had to use in that way. [74]

Q. All advertising, not only—

A. That is the heading on the column. It does not necessarily mean it is all advertising as pointed out here in the book; I mean, as designated through the book.

Q. In other words, it would cover stationery and things of that nature, and supplies?

A. Anything that would have our name on it.

Q. Prior to September 17, 1943—Counsel has had you go through the ledger account and pick out certain items which were either for wax or dance wax. Take "Dance Wax" for a minute. What would it be used for?

A. Yes. I will tell you. We used what we call dance wax. It comes in large containers—I think it is ten gallons that we buy—That is the way we bought it towards the last, anyway. It is used for asphalt tile, to polish asphalt tile. Our janitor used it always.

(Testimony of Irene Lambeth.)

Q. Where did you have the asphalt tile?

A. All around the bar.

Q. In which place?

A. Both places, as a matter of fact. At 1017 Southwest Sixth.

Q. Did you have any dancing at 1017 Southwest Sixth?

A. Never. There was no dance floor there, even, no space for dancing.

Q. As far as any wax there, it is just out of the question?

A. It was used with a waxing machine for the asphalt tile. [75]

Q. Up at the Southwest Yamhill location, until you got your restaurant permit, there likewise was no dancing?

A. No, we didn't have dancing. If we had dancing, the Liquor Commission would probably have given us another ticket. They checked very close on those things.

Q. During the period from May 1, 1943, to September 17, 1944, when you got your restaurant permit, and while there was no dancing, as you have testified, was there any other kind or form of entertainment?

A. Not unless you call a music box entertainment.

Q. Such as anything you might call a performance of any kind?

A. The only time that there would have been would be if there was a special occasion, a party of some kind.

(Testimony of Irene Lambeth.)

Q. I am talking about the period from April 1st—May 1st, 1943, to September 17th, 1943.

A. We did not have any entertainment, no, sir, at any time, Mr. Vosburg.

Q. In other words, you have testified positively that there was nothing which would include performances of any kind, such as singing, violin solos or anything of that nature?

A. Well, as a matter of fact, in afternoons we had a girl playing the solovox; for awhile we had a girl that played the solovox in the afternoon between 3:30 and 5:30, I believe.

Q. That would be orchestral music?

A. Yes, solovox. That is the only entertainment that we ever [76] had at the La Fiesta.

Mr. Vosburg: That is all.

Recross Examination

By Mr. Hamilton:

Q. You say you used dance wax to polish the tile around what?

A. The asphalt tile that is on the floor, in squares, laid in squares. It is also around bars where there are—The carpets were not clear up to the bar. There was a space of about, oh, I think six or seven feet around where people smoke cigarettes and that sort of thing, and that is polished—That is a polish which the janitors use.

Q. You had that tile at 1017 Southwest Sixth?

A. No, I think—I don't think it was tile there but it was something like it. It was linoleum, in-

(Testimony of Irene Lambeth.)

laid linoleum, I believe, as I remember, but we used it there, too.

Q. You have been handed Plaintiff's Exhibit No. 8, which is the ledger or a record of disbursements for the La Fiesta Club for 1943.

A. Yes.

Q. Attached to the page for May 22nd to May 31st, 1943, do you see a slip which is attached there?

A. Yes.

Q. What is that slip labeled at the top?

A. "Moving expense."

Q. And you see a notation down below, "Tile, \$23.00." [77]

A. Yes. Wait a minute. Yes.

Q. You did have tile then at 1017 Southwest Sixth, isn't that correct?

A. This tile—As a matter of fact, the tile that you are talking about is Spanish-type tile. We had it all around the side of the building, for the effect of roofing. You know, tile, little round things.

Q. Not exactly.

A. Well, it is regular roofing tile, is what it was, round type. We had a Spanish-type tile around the side.

Q. How did you polish that?

A. We didn't polish that. I am talking about the asphalt tile that is on the floor that we polished, polished the tile.

Q. You said you advertised as a reminder to your members. Weren't the members of your club bound together socially and interested in the ac-

(Testimony of Irene Lambeth.)

tivities of the club? Did you find it necessary to—

A. Most advertising that we did, as I explained before, was donations such as the Policemen's Benefit Ball and their magazine and that sort of thing.

Q. You just now testified that whenever you had any kind of a party or anything, you reminded the members?

A. That is right. We did that.

Q. Therefore, it took a lot of stationery?

A. That is customary in all clubs. [78]

Q. They were not a very closely knitted unit, then, were they?

A. Well, I would say yes, but it is customary in all clubs to do that.

Mr. Hamilton: That is all.

Mr. Vosburg: That is all. Thank you, Mrs. Lambeth.

(Witness excused.) [79]

C. B. MARX,

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vosburg:

Q. What are your initials, Mr. Marx?

A. C. B.

Q. Where do you live?

A. 480 Fifth Street, Oswego.

(Testimony of C. B. Marx.)

Q. How long have you lived at that place?

A. A little over two years.

Q. How long have you lived in Multnomah County?

A. About, right around twenty-nine or thirty—Pardon me. That is in Clackamas County, Oswego.

Q. Clackamas County?

A. Yes, but I lived here in Portland considerable of that time.

Q. What business are you now engaged in?

A. I am an officer of the Concrete Products Company of this city.

Q. Were you a member of the Cozy Club?

A. Yes, I was.

Q. Do you know about when you became a member?

A. I was a member before Mrs. Lambeth took over.

Q. Were you a member during 1943 and 1944 when Mrs. Lambeth was acting as manager? [80]

A. I must have been because I always have been a member ever since it was—

Q. Mr. Marx, during the time of the operation of the club on Southwest Yamhill, was it open to anybody or was it open only to members?

A. Only to members.

Q. Do you know that of your own personal knowledge? A. Yes.

Q. Have you ever seen an occasion, Mr. Marx, when people were refused admittance who were

(Testimony of C. B. Marx.)

not club members? A. Yes, I have.

Q. Have you ever seen an occasion when people who were not club members got in, where they were not guests of some club member?

A. No.

Q. Do you remember your number?

A. No, I don't.

Mr. Vosburg: May I see Exhibit No. 3, please?

Q. I was just interested. You are C. B. Marx?

A. C. B.

Q. According to this record, you are No. 32. You are one of the old, old members. How often did you patronize the Cozy Club or the La Fiesta Club when it was on Yamhill?

A. I would say in some cases maybe once a week; some cases, oftener; and then there would be periods when maybe for as long [81] as twenty, thirty or forty-five days that I didn't. I was what was known as a regular customer, I guess.

Mr. Vosburg: You may cross-examine.

Cross Examination

By Mr. Hamilton:

Q. Do you play golf? A. No, sir.

Q. Do you bowl? A. No, sir.

Mr. Hamilton: That is all.

Mr. Vosburg: That is all.

(Witness excused.) [82]

R. H. LAMBETH,

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vosburg:

Q. Mr. Lambeth, there has been a lot of discussion about your name. We only seem to know that it starts with a "R". What is the second initial?

A. Ray.

Q. Ray what? A. Ray H.

Q. You are not the Mr. Lambeth that was married to the plaintiff in this case? A. No.

Q. Where do you live, Mr. Lambeth?

A. My work is in Richland, Washington.

Q. Up at Richland? A. Yes.

Q. That is on the atomic bomb project?

A. Yes.

Q. You still maintain your home in Portland?

A. Yes, I do.

Q. Your wife lives here still? A. Yes.

Q. How long have you been a resident of Portland? [83]

A. Since about '42, the latter part of '42.

Q. You came here from Montana?

A. No, I came from Central Washington here.

Q. Montana to Washington to Oregon?

A. Yes, Washington to Oregon.

Q. Do you remember about when you first became acquainted with the Cozy Club?

(Testimony of R. H. Lambeth.)

A. Oh, I would say it was probably the early part of '43 or the latter part of '42.

Q. What are your brother's initials?

A. A. A.

Q. Did he have any position with the Cozy Club?

A. He was president — He was assisting the Cozy Club at times, trying to help it as much as possible. I believe at that time he was president of the club.

Q. Did you patronize the club?

A. Only as a guest of my brother's when I first came in.

Q. Your brother finally went away to the service? A. Yes.

Q. From then on what would you say as to the patronage you gave to the club?

A. Oh, I was in there, I would say, about once or twice a week. Is that the question you had in mind?

Q. I believe in June, 1944, your brother and Dr. Stevens—You knew Dr. Stevens, did you not?

A. Yes.

Q. Did you know him in Montana?

A. No, I got acquainted with him afterwards; down at the club, as a matter of fact.

Q. After Dr. Stevens and your brother had left for the war, I believe you became president of the club in June, 1944? A. Yes.

Q. Do you know, beginning in the forepart of 1944 and during your presidency, what policy was

(Testimony of R. H. Lambeth.)

adopted by the Cozy Club or the La Fiesta Club towards men that were in the service?

A. I believe the group down there felt many of the officers of the Army and Navy already have other places, like the Aero Club, that they have gone to, and did go to, but the enlisted men had very little places that they could take their friends, their girl friends, to a place that they could drink and dance, if necessary, and we thought perhaps we would reduce the amount that they would have to pay, that is, the membership, the amount of membership that was required, and the dues, and allow them to come in under military membership.

Q. During the period that you were president, when I believe Mrs. Sherman was vice-president and Mrs. Lambeth was secretary-treasurer, do you know how applications for membership, both military and civilian, were processed, the machinery that was gone through?

A. Yes, I believe that I can answer that. Investigation of the [85] members that made application—They had to be vouched for by another member. I have had to do it on several occasions, and they usually asked me, before I became president, as to what the member was, what his habits were and whether or not I could recommend him, and of course I did when I put in the application.

Q. That was the general procedure?

A. That was the general procedure. Then, of course, we did get together on some occasions—I have sat in on some of the meetings—and dis-

(Testimony of R. H. Lambeth.)

cussed whether or not we should have that member in the organization and if his attitude on the floor had been good enough so that we thought we could continue to have him as a member—That is, as to military only.

Q. I believe you said you participated in some meetings where you discussed prospective applicants, but generally I think you said it was passed upon by the other two officers?

A. I didn't say that, but that is true. It was usually passed upon by the other officers. After all, I was busy in another job that required twelve or fourteen hours a day, sometimes, to take care of it, and I wasn't able to be around the club at all times.

Q. Incidentally, did you propose anyone for membership?

A. Well, right offhand—That has been a long time ago, but I believe Al Hunter was one I brought in. I believe that was one of the members. He was a military man for the Navy that was down [86] on board ship at Albina. I proposed him, if I recall correctly.

Q. When you moved from the Southwest Sixth location to the Yamhill location, was it the desire of the club to increase their membership?

A. Yes.

Q. Why?

A. In order to have additional facilities and offer more facilities to the members that we already had, that were already there, and, after all,

(Testimony of R. H. Lambeth.)

with the war coming on, and in progress, as it were, everything was going up, costs were going up, and it had to have more membership in order to stay in business.

Q. At the old location on Southwest Sixth, 1017 Southwest Sixth, did you have a restaurant?

A. No.

Q. How about dancing? A. No.

Q. I don't suppose you remember the date or have any idea about when dancing started at 929 Southwest Yamhill?

A. I would not know, no. I am sorry.

Q. Do you know whether or not, when you first moved up to the Yamhill Street location, there was or was not dancing?

A. At the first, no, there wasn't any dancing. We were not allowed any.

Q. You don't know exactly when dancing started?

A. No, I don't. I couldn't answer that. [87]

Q. Do you know whether or not the question of judging applications was done in a fair manner, so that those people that you thought were entitled to join got in and those who were not, did not?

A. Well, from the conduct of the club, I believe it was done in a fair manner.

Q. Was it such a thing that anybody that made application got in, or was there selectivity of the people that got in?

A. There was selectivity of the people.

Mr. Vosburg: That is all.

(Testimony of R. H. Lambeth.)

Cross Examination

By Mr. Hamilton:

Q. You were president of the club?

A. Yes, I was president of the club from, I believe, about June, 1944, up until the time it dissolved in 1945.

Q. June, 1944?

A. In June, 1944. I believe that is correct.

Q. Therefore, you were a member of the board of directors? A. Yes.

Q. As such, it was one of your functions to pass on membership, is that right?

A. Whenever I was there and it was possible to do so, yes. However, as I explained here a moment ago, my work primarily was at Albina Engine & Machine Works during the war, and when you are working twelve and fourteen hours a day, which we did [88] during that time, I wasn't able to go up to the club often and I left that responsibility up to Mrs. Lambeth and Mrs. Sherman, more or less delegated them or saddled them with that responsibility.

Q. You testified here just now that you thought the members were selected on a fair basis and that there was selectivity, but you don't actually know, do you?

A. From the people I met in the club—and I feel I am a fair judge of people that I run across, and I can tell whether or not they are decent people, at that—I found every one of them to be very

(Testimony of R. H. Lambeth.)

courteous and at no time did they bother me in any way or give me any trouble, as far as that is concerned.

Q. That does not answer the question whether you know the selection was fair or not.

A. The only ones I know anything about are those that I sat in on.

Q. How many did you sit in on?

A. Offhand I couldn't answer that, because I don't know.

Q. I am not asking for the exact number, but about how many?

A. I would say I probably sat in on seven or eight, perhaps nine, maybe more.

Q. How many members of the club would you say were elected at each one of these meetings?

A. I wouldn't know, but I would say probably it would be an average of probably three or four, maybe five, maybe less, [89] depending on the day that I was up there.

Q. You testified you vouched for a number of members from the armed services? A. Yes.

Q. Who were those people? Your friends?

A. Well, they were friends that I had worked with. In the beginning of the war I was with the Navy section down at Albina, and there were a lot of fellows I knew down there from my work with them during the course of the day and I felt they were my friends, yes.

Q. Did you ever vouch for any soldier or sailor

(Testimony of R. H. Lambeth.)

that was just down for a day or so, whom you didn't see before? A. No.

Q. You did not? A. No.

Mr. Hamilton: I believe that is all.

Redirect Examination

By Mr. Vosburg:

Q. Where is your brother now, A. A. Lambeth?

A. My brother is in Seattle at the present time.

Mr. Vosburg: Thank you. May we excuse Mr. Lambeth?

Mr. Hamilton: Yes.

(Witness excused.) [90]

Mr. Vosburg: May it please the Court, the defendant has subpoenaed a former employee. I see her sitting back there, but I would just as soon call her as my own witness. May I call Miss Shanahan?

LANICE SHANAHAN,

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vosburg:

Q. Miss Shanahan, will you please give your full name to the Reporter?

A. Lanice Shanahan.

Q. Where do you live?

A. Carroll Hotel, Portland, Oregon.

(Testimony of Lanice Shanahan.)

Q. How long have you lived in Portland?

A. Six years.

Q. Do you know Mrs. Irene Lambeth?

A. Yes.

Q. Did you ever work for her?

A. Six years.

Q. For how many years? A. Six.

Q. Where did you work for her?

A. In 1017, the Cozy Club. [91]

Q. Then, after that?

A. The La Fiesta Club.

Q. Where do you work now?

A. Stark Club.

Q. Were you working for Mrs. Lambeth during the period, say, 1943 and 1944, when she was over at the Cozy Club or the La Fiesta, whichever you wish to call it, the one over at 929 Southwest Yamhill? A. Yes.

Q. What was your position there?

A. Waitress.

Q. What? A. Hat girl and waitress.

Q. Do you know whether or not during the period of time that you were there—I take it you were there during the entire time of 1943 and 1944? A. Yes, sir.

Q. During the period of time you were there, will you state whether or not the La Fiesta or Cozy Club was operated as a private or a public club? A. Private.

Q. How do you know that?

A. People that were not members were not

(Testimony of Lanice Shanahan.)

allowed in; had to be a member to be allowed in.

Q. Did you have occasion to be the attendant in charge of [92] admissions some time during December of 1944 when you had trouble about a liquor investigator getting in? A. Yes.

Q. How did you happen to be on the door at that time?

A. It was early in the evening; the checkroom girl had not arrived.

Q. And you were acting as relief?

A. Yes.

Q. You were not acquainted with the law enforcement officers, were you?

A. No, I was not, not all of them.

Q. This gentleman presented himself and asked for admission? A. Yes.

Q. Did you let him in? A. No.

Q. Why not?

A. Because he wasn't a member.

Q. How did you know?

A. He didn't have a card.

Q. And you rejected him? A. Yes.

Q. While you have been in charge of the door, from your own observations or otherwise, do you know whether non-members were admitted unless they came as guests of members?

A. Unless they were guests of a member and with them, with the [93] member, they were not admitted.

Mr. Vosburg: You may cross-examine.

(Testimony of Lanice Shanahan.)

Cross Examination

By Mr. Hamilton:

Q. The testimony in this case has been that the La Fiesta Club moved from 1017 Southwest Sixth to 929 Southwest Yamhill along about the middle of May, 1943. You were there at the time, weren't you? A. Yes.

Q. You moved with them from 1017 Southwest Sixth to 929 Southwest Yamhill? A. Yes.

Q. After the club moved to 929 Southwest Yamhill, at what period, at what time, did they start to dance? A. They started to dance—

Q. They started to dance immediately, didn't they?

A. No, not immediately. I don't remember just exactly how long it was—a little while after we had opened they started to dance.

Q. How long after?

A. Quite some time. I can't say exactly.

Q. Are you sure they did not start immediately? A. Not until the kitchen opened.

Q. When did the kitchen open?

A. I don't remember that. It has been quite a while ago. I [94] would say a month or so after we first opened.

Q. A month or so afterwards? A. Yes.

Q. That is when they started dancing?

A. As far as I know. I couldn't give you the exact date.

(Testimony of Lanice Shanahan.)

Q. You were employed there at the time. That was before September 17, 1943, wasn't it?

A. I can't remember that.

Q. You cannot?

A. No. I don't know whether it was before September 17th or after.

Q. Miss Shanahan, on Wednesday evening, March 31st, did you have a conversation with Mr. Pattison and Mr. Castle of the Bureau of Internal Revenue?

A. Yes, sir, what I had time for.

Q. I will ask you whether or not at that time -- That was at the Stark Club where you now work?

A. Yes. I was very busy.

Q. I will ask you whether or not at that time and place you told Mr. Pattison and Mr. Castle that immediately upon moving from 1017 Southwest Sixth Street to 929 Southwest Yamhill they began to dance in the Club La Fiesta or words, or words to that effect?

A. No, I don't think I said exactly that. I was busy with other people and a little confused, and I don't remember what [95] I said that night.

Q. You had a conversation with me last Saturday at approximately 5:00 or 6:00 o'clock, is that correct?

A. Yes, sir.

Q. That was in the lobby or just outside the lobby of the Carroll Hotel, where you live on Southwest Yamhill, is that correct?

A. Yes.

Q. I will ask you whether or not at that time and place, upon my questioning you as to when

(Testimony of Lanice Shanahan.)

dancing commenced at the Club La Fiesta at 929 Southwest Yamhill Street, whether or not you did not tell me that they started dancing at that club immediately upon moving in, or words to that effect?

A. They still did a lot of building in the place after we opened and could not have started dancing as soon as we moved in.

Q. I do not mean the first day, but I will ask you whether or not you did not tell me last Saturday that they always danced after they moved to 929 Southwest Yamhill?

A. I meant that after the club was finished—The kitchen was not finished, the floor was not finished—We had tables on the dance floor until some time after we got it all straightened out, and then we started dancing. That was when the kitchen was finished.

Q. You said you talked to Mr. Castle and Mr. Pattison and you [96] said that you were busy then and there were a lot of people around. You were not busy when you talked to me, were you?

A. No, I was not.

Q. There was nobody around to bother you?

A. When I said immediately after we opened, I meant when the place was remodeled. We did a lot of work. We were still open for business but we did a lot of work there.

Q. Dancing started before September 17th, did it not?

A. I couldn't tell you. I couldn't tell you the exact date.

(Testimony of Lanice Shanahan.)

Q. On March 31st, when you had this conversation with Mr. Pattison and Mr. Castle, at the Stark Club, I will ask you whether or not, at that time and place, in answer to their questions as to whether or not this was a public or a private club, you said that after they moved to 929 Southwest Yamhill they tried to keep it a private club for about three weeks, but it did not work out, and then they just opened it up, or words to that effect? Did you make that statement to them at that time?

A. Not exactly that way.

Q. What statement did you make to them?

A. When Mr. Pattison came to the Stark Club, I was busy and had work—I didn't know who they were. I was confused on it. I had very little conversation with him.

Q. I am asking you about a particular statement. Did you make that statement?

A. I don't remember. [97]

Q. You don't remember? A. No.

Mr. Hamilton: I believe that is all.

Redirect Examination

By Mr. Vosburg:

Q. Where did you have this conversation with Mr. Castle and Mr. Pattison?

A. When I was on duty at the Stark Club.

Q. How many of them were there?

A. Two.

Mr. Hamilton: How many of what?

(Testimony of Lanice Shanahan.)

Mr. Vosburg: Q. Just Castle and Pattison?

A. Yes.

Q. Those are the two gentlemen here, sitting in the back of the courtroom? A. Yes.

Mr. Vosburg: That is all.

Mr. Hamilton: That is all.

(Witness excused.) [98]

MARGARET SHERMAN,

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vosburg:

Q. Will you state your full name, please?

A. Margaret Sherman.

Q. Where do you live?

A. 7322 Southwest Canyon Drive.

Q. How long have you lived in Oregon?

A. About forty-eight years.

Q. All your life? A. Practically.

Q. How long have you lived in Portland?

A. That long.

Q. Portland all the time?

A. Yes, sir. Well, in and out; I lived all over Oregon.

Q. Did you have occasion to be associated with the Cozy Club or the La Fiesta Club when it was at 929 Southwest Yamhill?

A. Yes, both places.

(Testimony of Margaret Sherman.)

Q. Also at 1017 Southwest Sixth?

A. 1017, yes.

Q. Were you an officer at any time when they were up on Yamhill Street?

A. That is when I became an officer. [99]

Q. What can you say as to the practice or the method of operation of the club, specifically from May 1st, 1943, to September 1st, 1944, as to whether or not it was open to the public, or whether it was operated as a private club and open solely to members and members when accompanied by guests — guests when accompanied by members, rather.

A. We were strictly a membership club, open only to members and their guests.

Q. Are you familiar with the incident that Miss Shanahan testified to that occurred in December, I believe, some time in 1944, when you were visited by the Oregon Liquor Control Commission representative, or one of the members of that force?

A. I knew about it but I wasn't there.

Q. You were not there? A. No, sir.

Q. As a result of that visit, I take it that your license was suspended?

A. That is right, I think the very next day.

Q. When you moved from 1017 Southwest Sixth to 929 Southwest Yamhill, did you immediately begin dancing? A. No, sir, we did not.

Q. Do you know approximately, or do you know how long it was before you started to dance there?

(Testimony of Margaret Sherman.)

A. I don't exactly know the date, but it was several months.

Q. Are you familiar with the policy that the club adopted [100] towards servicemen in the spring of 1944?

A. Yes. I certainly am.

Q. In June, 1944, you were elected vice-president, were you not?

A. Yes.

Q. After you were elected vice-president, do you know what method was used in determining whether or not a person should become a member after he had made application?

A. Yes, sir, I do.

Q. Just tell the Court what the machinery was?

A. Members would come in and we would take their application for others who wished to be a member, and then we would decide, and if they were eligible to become members we took them in.

Q. Did everybody who made an application become a member?

A. No, sir.

Q. Did you use a degree of selectivity in ascertaining who should or should not be members?

A. We did.

Q. Other than law enforcement agents, up to 1945, do you know whether or not any person came—Do you know of any person coming to the club who was a non-member and who did not come as a guest?

A. I certainly do not.

Q. How did you operate the door so as to let members and non-members in? [101]

A. We had an electric buzzer on the door. If they were members, why, we buzzed the door and they entered that way.

(Testimony of Margaret Sherman.)

Q. I take it if you did not know them they had to produce a card? A. That is right.

Q. Do you know whether or not people coming to the door were refused admittance?

A. Yes, we refused lots of them.

Q. Under what circumstances?

A. They did not have a card to come in, were not members.

Mr. Vosburg: You may cross-examine.

Cross Examination

By Mr. Hamilton:

Q. Are you familiar with the by-laws of the Cozy Club? A. Yes.

Q. Have you ever read them?

A. Pardon?

Q. Have you ever read them?

A. Read them? Yes.

Q. Do you know that the by-laws state that it is particularly desirable "that the activities of the club and the members thereof be constituted in a respectable manner."? Do you know that?

A. Yes.

Q. And for that reason they wanted to be very careful about the members they selected? [102]

A. Yes.

Q. You know that? A. Yes.

Q. Yet, despite that so-called policy of the club, the club elected these so-called members, for instance, members of the armed services that nobody knew? A. Well—

(Testimony of Margaret Sherman.)

Q. Just upon showing up there one night and not getting into a fight or acting disrespectfully, is that correct? A. Yes.

Q. Do you think that constitutes selecting members?

A. We didn't have any trouble with them, their conduct was very good.

Q. You did not have any trouble with them for maybe an hour or so that night. That is right, isn't it? A. What?

Q. You did not have any trouble with them for maybe an hour or so one night, and that is all it took for a man to prove himself, isn't that true?

A. Well, possibly they came the next night; they could still be a guest.

Q. They might come back again or might not, but they could be elected on the basis of their performance of one night? A. Well, yes.

Mr. Hamilton: That is all. [103]

Redirect Examination

By Mr. Vosburg:

Q. In addition to their performance, they had to be vouched for. You investigated them through other members, did you not? A. Yes.

Mr. Vosburg: That is all.

Recross Examination

By Mr. Hamilton:

Q. You investigated them through what members?

A. The members that brought them in with

(Testimony of Margaret Sherman.)

them was the basis of the recommendation we had.

Q. Did you know the board of directors was supposed itself to investigate? Did you know that?

A. Well, I can't say that.

Mr. Vosburg: It is a trifle argumentative, may it please the Court.

Mr. Hamilton: I beg your pardon.

Q. Did you know that a paragraph in the by-laws of the Cozy Club said that the officers of the club shall investigate the desirability of such applicants for membership? Did you know that?

A. Yes.

Q. Did you ever do any investigating, beyond seeing a soldier or sailor in there for one night, drinking?

A. Lots of times we did.

Q. But you never investigated personally, did you? [104]

A. Yes, I did.

Q. You did?

A. Yes. That was one of my jobs.

Q. Did you investigate all applicants?

A. Yes, I did.

Q. How did you investigate them?

A. I was there seven days a week.

Q. What did you do to investigate them?

A. Well, we asked their friends and we—

Q. You asked what friends?

A. The guest—the member that brought them in, and then we watched how they conducted themselves after they arrived or came in the club.

Q. That was your investigation. Did you ever have a fight in this club?

A. A fight?

(Testimony of Margaret Sherman.)

Q. Yes.

A. I expect we did. What club didn't have a fight during the war?

Q. I am not questioning that.

A. That is right. I mean we did have, yes.

Mr. Hamilton: That is all.

Mr. Vosburg: That is all.

(Witness excused.) [105]

Mr. Vosburg: May it please the Court, in the original pre-trial order that your Honor signed, in Paragraph 5 is set forth a table showing the income, rate of tax and the amount of tax, and in the last column is a blank for the amount of interest. The reason for that omission is because the Government which made up this assessment was not able to give me the figures on interest.

Mr. Hamilton, I would like permission to insert in that order, as signed by his Honor, the figures that you gave me for interest, together with the total amount of the assessment, plus the amount of tax. I take it that you will stipulate that is the correct amount of interest and the correct amount of tax that was collected—not the correct amount, but the amount of the tax?

Mr. Hamilton: The Government will so stipulate.

Mr. Vosburg: I want it distinctly understood. The plaintiff rests.

(Plaintiff rests.) [106]

Defendant's Testimony

FREDERICK C. ALDRICH,

was thereupon produced as a witness on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamilton:

Q. Will you please state your full name?

A. Frederick C. Aldrich.

Q. By whom are you employed?

A. Oregon Liquor Control Commission.

Q. In what capacity?

A. As license supervisor.

Q. Stationed in Portland? A. Pardon.

Q. You live here in Portland? A. Yes.

Q. In your capacity as license supervisor for the Oregon Liquor Control Commission, it is your function to keep records and so forth of these various clubs. Do you have those records in your possession?

A. I have records of all licensees.

Q. Do you have with you the file on the La Fiesta Club? A. I do.

Q. Do you know and can you tell the Court whether or not the La Fiesta Club was ever licensed by the Oregon Liquor Control [107] Commission to operate as a private club? I will reverse that. Did you issue the club a license?

A. As far as the records I have are concerned, they were never issued a license as a club; in

(Testimony of Frederick C. Aldrich.)

other words, they did not have a club license from the Oregon Liquor Control Commission.

Q. That covers the period from May 1, 1943, to September 18, 1944, is that correct?

A. Yes.

Q. Will you please tell the Court what kind of a license they did have?

A. They had a restaurant and service license.

Q. Mr. Aldrich, did the La Fiesta Club ever apply for a club license?

A. Yes, they did apply.

Q. On what date, do you have that information?

A. May I refer to the record?

Q. Yes.

A. They applied for a club license July, 1944. The application was refused by the Commission.

Q. Do you know why it was refused by the Commission?

Mr. Vosburg: Just a minute, your Honor. That I think is calling for hearsay, as to what the Commission did. Just a minute. Let me make my objection. That is calling for hearsay as to why a particular application was refused. Here we have a supervisor who has come in and is asked to tell what the Commission did and [108] why they did it. I object to that, your Honor.

The Court: Mr. Vosburg, I tried probably two hundred draft cases during the war and in every one of them the Clerk of the Board was the only member of the Board who was present in the courtroom, and he was asked why the Board had classi-

(Testimony of Frederick C. Aldrich.)

fied this man or that man in a particular way, and we just stumbled along the best we could and, while technically it might be objectionable, even in the presence of a jury it doesn't do any great harm, so I will let this witness answer.

A. The Commission refused the granting of a club license for the reason that the applicant did not meet all the requirements of the type of license for which it applied. That was the reason, the official reason the Commission gave.

Q. Is that broken down in any more detail?

A. In no more detail than that.

Mr. Hamilton: I believe that is all.

Cross Examination

By Mr. Vosburg:

Q. As I understand it, it is your testimony here that the Cozy Club had a service license and a restaurant license at 929 Southwest Yamhill Street, is that correct? A. That is right.

Q. And the applicant that had that license was the Cozy Club and Irene E. Lambeth, Manager, was it not? Or was it just the Cozy Club, Irene E. Lambeth, Manager? [109]

A. By Irene Lambeth, Manager.

Q. In other words, the license was in the name of the Cozy Club and it just recited on there "Irene E. Lambeth, Manager," isn't that correct?

A. That is right.

Q. I think your records will also show, will they not, that from the 20th of January, 1945, until

(Testimony of Frederick C. Aldrich.)

the 14th of February, 1945, this club was without any license?

A. May I have those dates again?

Q. I beg your pardon?

A. May I have those dates again?

Q. I think it was on or about the 20th or 21st day of January, 1945, to on or about the 14th day of February, 1945? A. That is right.

Q. Do I have my dates exactly right?

A. The license was canceled January 21, 1945, and reinstated February 14, 1945.

Q. February 14, 1945? A. Yes.

Q. Now, sir, is it not a fact that the reason why that license was canceled was because the Commission claimed that it, the Cozy Club, was being operated as a private club?

A. That is right.

Q. In other words, the only license that they had, the Cozy Club, to operate was a service license and a restaurant license? [110]

A. That is right.

Q. That type of license compelled them to accept anybody from the public that conducted themselves in a reasonable decorous manner?

A. That is right.

Q. And since the Cozy Club was only operated as a private club, they revoked the license because they were doing what the Liquor Commission

(Testimony of Frederick C. Aldrich.)

thought they were not entitled to do, to-wit, operate a private club, is that correct?

A. That is right.

Mr. Vosburg: That is all.

Redirect Examination

By Mr. Hamilton:

Q. I would like to ask you, Mr. Aldrich: The reason that the club was closed up and the reason they said they were operating as a private club was because, in December, 1945, an inspector, I believe, of the Liquor Commission, went to the club and was refused admittance, isn't that correct? A. That is right.

The Court: Who?

Mr. Hamilton: A liquor investigator, your Honor.

Q. And when you say that the license was revoked in January because it was operated as a private club, what you actually mean is that—Did you mean that it was attempted to be operated as a private club? Did you mean that it was attempted to be [111] operated as a private club when it was not licensed to do so?

Mr. Vosburg: Just a minute, your Honor.

The Court: Read the question.

(Question read.)

The Court: Answer.

A. I have no way of telling how the club was operating except from our investigator's report and the reason the Commission gave for revoking

(Testimony of Frederick C. Aldrich.)

the license. The license was revoked for the reason that the club refused service to persons entitled to patronize the premises of the licensee and operated the licensed premises as a private rather than a public establishment.

The Court: What have you just read from?

A. Read from the official record in the file of the Cozy Club.

The Court: The record of the Oregon Liquor Control Commission? A. Yes.

Mr. Vosburg: That is dated when?

A. That is dated January 19, 1945.

Mr. Vosburg: That is all.

Mr. Hamilton: That is all.

(Witness excused.) [112]

CARL S. CASTLE,

was thereupon produced as a witness on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamilton:

Q. Please state your name?

A. Carl S. Castle.

Q. By whom are you employed?

A. Collector of Internal Revenue.

Q. In what capacity?

A. As a deputy collector.

Q. You are acquainted with the facts in this case, are you not?

(Testimony of Carl S. Castle.)

A. I made the investigation on it, yes.

Q. About what period of time did you conduct the investigation?

A. I would say between the months of June and August, 1944.

Q. 1944? A. Yes.

Q. In that investigation you had access to the books and records of the plaintiff, did you not?

A. Yes, sir.

Q. Did you make an investigation, and from those books derive certain figures as to so-called guest attendance on Saturday during certain months in 1943 and 1944? A. Yes, sir.

Q. I will ask you to state to the Court what information you [113] obtained along that line?

A. May I refer to my notes?

Q. Yes.

A. We were told by Mrs. Lambeth that this charge in question was a guest charge, in the amount of 75 cents and was made Saturday nights only, and the charge was not supposed to apply to so-called members, nor apply to servicemen.

Q. Speak louder.

A. We have made a compilation for the month of September, 1943, and through May, 1944, listing the total guest charge collected during those months, and then we have also made a compilation—

Q. You made a compilation of the guest charge collected for the Saturday nights during each month? A. Yes.

(Testimony of Carl S. Castle.)

Q. Then, on the basis of paying 75 cents per guest per head, you determined how many guests were present on Saturday nights during the month and how many persons each Saturday night?

A. Yes.

Q. Will you please read those figures to the Court?

A. For the month of September, 1943, the total charge—the total guest charge was \$205.00 and, as you have just explained, to save repetition, the number of persons per month 274, or per night, 68.

October, 1943, the guest charge is \$220.00. Persons per month, 293, and persons per night, 59.

November, 1943, the guest charge is \$245; persons per month, 326, and persons per night, 82.

December, 1943, the guest charge was \$243; persons per month, 324; persons per night, 81.

January, 1944: Guest charge, \$372.50; persons per month, 496; persons per night, 99.

February, 1944: Guest charge, \$234.00; persons per month, 311; persons per night, 78.

March, 1944; Guest charge, \$225.50; persons per month, 301; and persons per night, 75.

April, 1944: Guest charge, \$228.00; persons per month, 304; persons per night, 76.

May, 1944: Guest charge, \$349.75; persons per month 464; persons per night, 116.

Q. That means, to emphasize again the last figure you gave, persons per night, that means the

(Testimony of Carl S. Castle.)

average on each Saturday night in the month, doesn't it? A. Yes.

Q. Why do you only have those figures for September, 1943, to May, 1944?

A. That is the only record of guest charge that was in the books. The guest charge had definitely discontinued in May, 1944; at least, we have no further record.

Q. You mean there were no figures covering any other months in the books? [115]

A. Other than possibly there might have been some in April, 1944. Of that I am not sure. I think it was for a portion of the month.

Q. During the course of your investigation, did the plaintiff tell you what the capacity of the La Fiesta Club was, that is, the average seating capacity? A. Yes.

Q. What did she say it was?

A. In fact, we asked her and Mrs. Lambeth informed us the seating capacity was approximately 87 persons.

Q. 87 people? A. Yes.

Q. During the course of your investigation, did you determine from the plaintiff's books what the receipts of the La Fiesta Club were from January to July, 1944? A. Yes, sir.

Q. Do you have that in your notes?

A. Yes, sir.

Q. Would you please read to the Court that record?

A. For January, 1944, \$3,838.16; February, \$3,-

(Testimony of Carl S. Castle.)

685.61; March, \$4,549.10; April, \$4,656.50; May, \$5,045.45; June, \$4,790.50; and July, \$5,264.55.

Q. Yes. You have been sitting here. You heard the witness called by the plaintiff, Miss Shanahan, testify, did you? A. Yes, sir. [116]

The Court: What were those figures he just read?

Mr. Hamilton: Those were the figures taken from the books, the monthly receipts for the first months of 1944.

Mr. Vosburg: They are set forth in Paragraph 5.

The Court: What are they?

Mr. Hamilton: Gross receipts, as I understand it.

Mr. Vosburg: Paragraph 5 of the pre-trial order.

The Court: I don't care where they are. I want to know what they are.

A. Gross receipts, slot machines or music machines—

Mr. Hamilton: Q. You heard the witness, Miss Shanahan, called by the plaintiff; you heard her testify. I will ask you whether or not you had a conversation with her at the Stark Club on East Stark Street on the evening of March 31, 1948?

A. Yes, sir.

Q. At that time and place, did you question the witness, Miss Shanahan, as to when dancing was commenced at 929 Southwest Yamhill?

A. Yes.

(Testimony of Carl S. Castle.)

Q. What did she tell you?

A. That dancing was commenced immediately upon the club moving in to 929 Southwest Yamhill.

Q. She said that or words to that effect?

A. Yes, sir.

The Court: From your point of view, what difference does it [117] make when it began?

Mr. Hamilton: It makes a difference, may it please the Court. It makes a difference—If it should be held by the Court that the La Fiesta Club was a public club instead of a private club, then it makes a difference as to when dancing began because music alone does not constitute a performance; music plus dancing does constitute a public performance for profit and, therefore, if the club is a public club, and—

The Court: In other words, you only claim at most from the time when dancing began?

Mr. Hamilton: Yes, that is correct. That is when the cabaret tax would be assessed, from the time dancing began, and it makes a difference. If it is a public club, and if the Court finds that to be the fact, then if dancing commenced when they moved into the club—

The Court: When was that?

Mr. Hamilton: Approximately in May. Well, there has been a difference in the testimony—From May 17th to May 19th, 1943. Plaintiff admits that there was dancing after September 17, 1943, so

(Testimony of Carl S. Castle.)

we have four or five months where the question is material.

Q. Mr. Castle, she at that time told you dancing commenced immediately upon moving into 929 Southwest Yamhill?

A. Yes, we were given to understand that there was dancing there from the time they moved in. At least, that is the impression she gave us. [118]

Q. Do you remember questioning her concerning the nature of the club as a public or private club?

A. Yes, sir, we asked her.

Q. What did she tell you?

A. She told us to the effect that Mrs. Lambeth attempted to operate the club at 929 Southwest Yamhill as a private club for some three or four weeks but it did not work out and the idea was abandoned.

Mr. Hamilton: That is all.

Cross Examination

By Mr. Vosburg:

Q. These figures you gave on Saturday nights, showing what the average attendance would be, that is, of guests, you only worked those up until about May, 1944?

A. I believe we ran out of figures. Maybe I can tell you. I think we ran out of cover charges, as I recall.

Q. I thought you said they discontinued guest cards about May 1st, did you not?

A. No, you misunderstood me, I believe. I

(Testimony of Carl S. Castle.)

meant to say they must have discontinued the guest charge.

Q. The guest charge?

A. Guest charge. I seem to have run out of cover charge figures.

Q. Never mind, then. As I understand it, these figures are based on your assumption that cover charges collected could only relate to cover charges collected Saturday night? [119]

A. That is all we were told.

Q. It was based on the supposition that a cover charge was only collected Saturday night?

A. That is what Mrs. Lambeth told us.

Q. I don't care who told you. That is based on the supposition that the only time a cover charge was made was on a Saturday night, is that correct?

A. I hate to call it a supposition because that is what we were told what it is. That is the way we computed it, yes.

Q. If it should develop that these figures in the books represent the cover charge that was assessed against non-members, not only on Saturday night but on Friday night, your averages would be just cut in half, would they not? A. Yes.

Q. So, where you say that in October, 1943, you find the average is 59, if a cover charge was in fact assessed against non-members in excess of two to each member, it shows that there must have been 59 non-members as guests, but if we add to the figures you have given a cover charge for both

(Testimony of Carl S. Castle.)

Friday and Saturday night, roughly, you would cut your average in half and instead of 59, you would have, roughly, 30? A. Yes.

Q. And so on straight through your computation? A. Yes.

Q. You would just cut that in half, wouldn't you? [120] A. Yes, surely.

Mr. Vosburg: That is all.

Mr. Hamilton: That is all.

Mr. Hamilton: May it please the Court, I don't know whether it would be appropriate but, if possible, I would like to take the stand to impeach the witness Shanahan, called by the plaintiff.

Mr. Vosburg: May it please the Court—

The Court: Wait a minute, now. That is the worst practice a lawyer can get into. It is the greatest temptation. I learned early in my practice about two types of people. One was the type that you could always find showing up as a witness on one side or another. Another was the lawyer who never had a case in his life but what he wanted to be a witness in it.

That is why this Court and every other civil trial Court had to put a limitation on lawyers being witnesses. The limitations are different in degree. Sometimes they actually forbid a lawyer to be a witness. Usually they forbid him to argue the case, disqualify him arguing the case if he becomes a witness.

You have offered impeachment of her here by another man. You can take the stand if you want to but, if I were you, I would just resist the temp-

tation, not only in this case but every other case.

Mr. Hamilton: Yes, your Honor. The defendant rests.

Mr. Vosburg: I haven't the slightest question in my mind that what counsel said occurred is correct. I wish the Court to know it. I have no question in my mind but what he says occurred. He says this little girl was confused and I think that is correct.

The Court: I know how great the temptation is. Do you rest?

Mr. Hamilton: The defendant rests.

Mr. Vosburg: We have no rebuttal, your Honor.

The Court: Argue the case.

(Argument of counsel; case submitted.)

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 5th and 7th days of April, A. D. 1948, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 122, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said dates as aforesaid, and of the whole thereof.

Dated this 29th day of May, A. D. 1948.

/s/ IRA G. HOLCOMB,

Court Reporter.

[Endorsed]: Filed Aug. 20, 1948.

[Endorsed]: No. 12026. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Irene Ethel Lambeth, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed August 20, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12026

THE UNITED STATES,

Appellant,

v.

IRENE ETHEL LAMBETH,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON APPEAL
AND DESIGNATION OF RECORD
FOR PRINTING

Comes now The United States, appellant above named, by Henry L. Hess, United States Attorney for the District of Oregon, and Floyd D. Hamilton, Assistant United States Attorney, and for a statement of points on which it intends to rely, says:

The statement of points to be urged by appellant in this Court are the same as those set forth in the statement of points filed with the District Court pursuant to Rule 75(d) of the Federal Rules of Civil Procedure.

Appellant designates for printing the entire record filed with this Court, with the exception of exhibits of both parties.

Dated this 27th day of September, 1948 at Portland, Oregon.

HENRY L. HESS,
United States Attorney for the
District of Oregon.

/s/FLOYD D. HAMILTON,
Assistant United States
Attorney.

(Affidavit of Service attached.)

[Endorsement]: Filed September 28, 1948. Paul P. O'Brien, Clerk.

No. 12026

In the United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

IRENE ETHEL LAMBETH,
Appellee.

On Appeal from the United States District Court
for the District of Oregon

BRIEF FOR THE UNITED STATES

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Assistant Attorney General.
ELLIS N. SLACK,
ROBERT N. ANDERSON,
FRED J. NEULAND,
*Special Assistants to the
Attorney General.*

HENRY L. HESS,
United States Attorney.
FLOYD D. HAMILTON,
Assistant United States Attorney.

NOV 15 1948

PAUL R. O'BRIEN,

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United States Attorney.
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Assistant United States Attorney.

OPINION BELOW

The District Court did not file a written opinion.

JURISDICTION

This appeal involves cabaret admissions taxes and interest thereon, imposed by Section 1700(e) of the Internal Revenue Code, as amended by Section 622 of the Revenue Act of 1942, for the period September 17, 1943, until July 31, 1944, in the total amount of \$6,538.21.¹ (R. 9.) The taxes in dispute were paid on September 18, 1944. (R. 8.) A claim for refund was filed by the taxpayer on September 28, 1944. (R. 8.) The claim was rejected by the Commissioner of Internal Revenue by notice dated February 11, 1946. (R. 8.) On December 18, 1947, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayer instituted an action in the District Court for the recovery of the taxes and interest paid. (R. 2-4.)

Jurisdiction was conferred on the District Court by Section 24, Twentieth, Judicial Code. Judgment was entered

(1) The cabaret taxes sought to be recovered in taxpayer's complaint amounted to \$6,917.91, and covered the period May 1, 1943, through July 31, 1944. (R. 4.) The Government has now conceded that the taxpayer is entitled to recover the cabaret taxes and interest assessed for the period May 1, 1943, to September 17, 1943, in the aggregate amount of \$379.70, plus statutory interest.

on April 27, 1948. (R. 17.) Within sixty days thereafter and on June 26, 1948, notice of appeal was filed. (R. 18-19.) The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that during the period involved the taxpayer was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit within the meaning of Section 1700(e) of the Internal Revenue Code, as amended.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 1700. TAX.

There shall be levied, assessed, collected, and paid—

* * * * *

(e) [as amended by Section 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798.²] *Tax on Cabarets, Roof Gardens, Etc.*—

(1) *Rate.*—A tax equivalent to 5 per centum³

(2) The effective date of this amendment was November 1, 1942.

(3) This rate was changed by Section 1650 of the Internal Revenue Code, as added by Section 210 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and amended by Section 302(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21.

of all amounts paid for admissions, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

(2) *By whom paid.*—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments.

* * * *

(26 U.S.C. 1946 ed., Sec. 1700.)

Treasury Regulations 43 (1941 ed.):

SEC. 101.13 [as amended by T. D. 5349, 1944 Cum. Bull. 639]. *Basis, rate, and computation of tax.*—The tax imposed by section 1700(e), as amended, applies to all amounts paid for admission, refreshment, service, and merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for

profit, by or for any patron or guest who is entitled to be present during any portion of such performance.

* * * * *

SEC. 101.14 [as amended by T. D. 5192, 1942-2 Cum. Bull. 249]. *Scope of tax.* — The term "roof garden, cabaret, or other similar place" includes any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A public performance furnished at a roof garden, cabaret, or other similar place shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance.

Where music, whether by an orchestra, a mechanical device, or otherwise, and a space in which the patrons may dance is furnished in the dining room of a hotel, or in a restaurant, bar, etc., the entertainment constitutes a public performance for profit at a roof garden, cabaret, or similar place, and the payments made for admission, refreshment, service, and merchandise are subject to the tax.

Amounts paid for refreshment, service, or merchandise in a room which is entirely separate from the room in which entertainment is furnished are not subject to tax, provided that the patrons in such separate room may not witness the entertainment and any door in the wall or partition separating the two rooms remains closed during the period of the entertainment except when persons pass from one room to the other.

* * * * *

STATEMENT

The material facts may be summarized as follows:

At all times here involved the taxpayer was a resident of Portland, Oregon. (R. 13.) In October, 1941, the taxpayer became connected with the Cozy Club (R. 15, 38), at or about which time she entered into an agreement with a Mr. Church, the then manager of the club, to take over the management thereof (R. 39). At that time, she purchased equipment used by the club and then owned by Mr. Church. (R. 39.) Under the arrangement, it was agreed that in consideration of operating the club, the taxpayer was to receive the entire profits derived from the sale of beverages and food, and that she would be responsible for the payment of all expenses incurred. (R. 40.)

Originally, the Cozy Club was located at 1017 Southwest Sixth Avenue, Portland, Oregon. (R. 41.) It continued to operate at that location after the taxpayer took over its management until May 18, 1943, when the club quarters were moved to 929 Southwest Yamhill Street (R. 45), where the taxpayer operated the club after that date and during the period here involved under the name of the La Fiesta Club (R. 53).

When the taxpayer originally took over the management of the club and up to September 17, 1943, it was operated under a so-called service liquor license issued by the Ore-

gon State Liquor Control Commission, under which type of license dancing was not permitted. (R. 45-46.) No license was ever issued by the Commission permitting the Cozy or La Fiesta Club to operate as a private club. (R. 123-127.) Prior to September 17, 1943, no dancing facilities were furnished by the taxpayer at either place.⁴ (R. 48.) On September 17, 1943, taxpayer obtained a restaurant license in connection with the operation of the club at 929 Southwest Yamhill Street, under which license she was permitted to operate a public restaurant. (R. 48.) Under this license persons were allowed to dance. (R. 48-49, 74.) After that date and during the entire period involved, the taxpayer furnished dancing facilities and dancing was allowed. (R. 48-49, 74, 133.) Music for dancing was furnished in the dining room of the club by a mechanical machine playing records, commonly called a juke box. (R. 47.) The seating capacity of the dining room was eighty-seven persons. (R. 131.)

The LaFiesta Club quarters were located on the second

(4) The record is not clear as to when music and dancing facilities were first furnished between May 1, 1943, and September 17, 1943. (R. 48, 112-114, 132-133.) Since it appears that dancing was not permitted under the service license under which taxpayer operated prior to September 17, 1943 (R. 48), the Government has conceded that no dancing was allowed in the club prior to that date. (See Footnote 1.)

floor of the building situated at 929 Southwest Yamhill Street. (R. 46.) They contained complete restaurant facilities, including barroom, check room, dining room, kitchen, lockers and necessary plumbing, the total area of which was approximately 2,500 square feet. (R. 46, 49.) Access thereto was by a stairway, at the bottom of which was a swinging double door, and at the top of which was a large, heavy bolted door, which could only be opened by a push button on the inside. (R. 47.)

Membership cards introduced in evidence indicated that a charge of \$3 per year was made as dues to members. (R. 58.) Membership in the club could be applied for by persons who were asked to join the club, usually by someone who had previously brought the prospective member to the club as a guest. (R. 56.) Applications for membership were passed on by the taxpayer and a Mrs. Sherman, who was secretary-treasurer (R. 56-57), and the record clearly indicates that almost anyone who conducted himself as a guest in a satisfactory manner could become a member by making application therefor (R. 57-58.) During the early part of 1944, enlisted personnel of the military forces were permitted to obtain a membership by the payment of only fifty cents. (R. 59.) R. H. Lambeth, president of the club after June, 1944, testified that this policy was adopted because "enlisted men had very little places that they could take their friends, their girl friends, to a place where they

could drink and dance, if necessary, and we thought perhaps we would reduce the amount that they would have to pay, that is, the membership * * * and allow them to come in under military membership." (R. 104.) He also testified that the club could not have remained in business unless additional membership from this source was obtained. (R. 105-106.) Many of these military memberships were secured through guest cards which were passed out by Military Police. (R. 88.) The club was frequented by sailors and soldiers every day during the period involved, who gained admission on their first visit by use of a guest card, and once admitted as a guest, they could immediately make application and obtain a membership. (R. 89.) The only manner in which applications were judged and passed upon was with respect to their conduct as guests which, if good, was sufficient to qualify them as members. (R. 90.) Mrs. Edith L. Deck, a witness for the taxpayer, testified that she and her husband became members of the club on their own application without being introduced by a member. (R. 78.)

Members were permitted to bring two guests to the club, but if a member brought more than two guests, a cover charge of seventy-five cents was made for each extra guest. (R. 93, 129-130.) This usually occurred on Friday and Saturday nights. (R. 94, 135.) On the basis of the cover charges collected from guests in excess of two on Friday and Saturday nights from September, 1943, through May,

1944, an average of approximately forty extra guests were present on each of those nights during that period. (R. 130, 135.) It would thus appear that the number of members and guests present each Friday and Saturday night during the period involved was enough to fill the capacity of the dining room, namely eighty-seven persons. (R. 131.)

The club had no bank account separate and apart from the taxpayer's bank accounts. (R. 50.) Money received from membership fees and dues was deposited in taxpayer's special account and used to reimburse her for money advanced for remodeling and decorating the club premises. (R. 40, 50.) During the period involved, the taxpayer received all income from the club operations, including the proceeds from the sale of alcoholic beverages, food, slot and mechanical music machines (R. 40, 131-132), and after paying all expenses of operations (R. 40), retained the profit (R. 49). Taxpayer also maintained books of accounts showing her gross receipts of the club upon which the amount of the cabaret taxes involved herein was determined. (R. 131-132.) Considerable amounts were spent by the taxpayer for advertising and a neon sign was erected outside the club premises at a cost of \$169. (R. 79-81, 83-84.)

The taxpayer filed a timely claim for refund of the total amount of \$6,917.91 paid as assessed cabaret taxes and interest. The claim was rejected in its entirety on February 11, 1946. (R. 14-15.)

The District Court found as a fact that during the period involved, the taxpayer was managing the Cozy or La Fiesta Club as a private club, organized under the laws of the State of Oregon as a non-profit corporation; that the club was not open to the public but open only to its members and their guests, and that she was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit. The court thereupon concluded that the imposition of the cabaret tax under Section 1700(e) of the Internal Revenue Code, as amended, and the applicable Regulations was illegal and erroneous. (R. 15-16.) Accordingly, judgment was entered for refund to the taxpayer of \$6,917.91, with interest. (R. 17.)

STATEMENT OF POINTS TO BE URGED

The District Court erred:

(1) In finding that during the period involved, the taxpayer was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit.

(2) In failing to find that during the period involved, the taxpayer was operating and managing a roof garden, cabaret or other similar place furnishing a public performance for profit.

(3) In finding that during the period involved, the taxpayer was managing and operating the Cozy Club as a

private club, not open to the public, and that admission to its club rooms was open only to members and their guests.

(4) In concluding that the imposition of the cabaret tax and interest thereon assessed against the taxpayer was illegal and erroneous and not within the purview of Section 1700(e) of the Internal Revenue Code and applicable Regulations.

(5) In failing to conclude that during the period involved, taxpayer was operating a roof garden, cabaret or other similar place at the Cozy or La Fiesta Club furnishing a public performance for profit within the purview of Section 1700(e) of the Internal Revenue Code and applicable Regulations.

(6) In concluding that the taxpayer was entitled to judgment in the sum of \$6,917.91, with interest.

SUMMARY OF ARGUMENT

On the facts and the law, the District Court erred in finding that the taxpayer was operating and managing the Cozy or La Fiesta Club as a private club organized as a non-profit organization and in concluding that she was not operating a roof garden, cabaret or other similar place furnishing a public performance for profit within the meaning of Section 1700(e) of the Internal Revenue Code and the applicable Treasury Regulations.

There is no dispute as to whether a performance for profit was furnished by the taxpayer, at least with respect to the period after September 17, 1943, through July 31, 1944, as the record is clear that food and refreshments were served to patrons of the club and that such patrons were permitted to dance during that period to the music of a mechanical device or juke box. The only issue of fact and of law involved is whether in her operation and management of the club, the taxpayer furnished a "public" performance for profit within the purview of the statute. Viewing the facts of record as a whole and considering the provisions of the statute and applicable Regulations, it appears clear that she did, and that the court below erred in holding otherwise.

The problem presented here is one of importance and the final disposition thereof will have a very broad application. The Bureau of Internal Revenue has been endeavoring to subject this type of business operation to the cabaret tax because such establishments are actually operating as cabarets under the guise of private clubs. The Government contends that such establishments are not bona fide clubs in any sense of the word, but instead cabarets or other similar places which cater to the public generally.

ARGUMENT

During the period involved, the taxpayer furnished a public performance for profit at the Cozy or La Fiesta Club within the meaning of Section 1700(e) of the Internal Revenue Code.

Section 1700(e) of the Internal Revenue Code, as amended, *supra*, provides that a cabaret tax shall be assessed on all amounts paid for admission, refreshment, service or merchandise at any roof garden, cabaret or other similar place furnishing a "public performance for profit", by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place", as used in Section 1700(e), includes any room in any hotel, restaurant, hall or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, is afforded the patrons in connection with the serving or selling of food, refreshment or merchandise.

There is no dispute as to whether taxpayer furnished a performance for profit, at least with respect to the period after September 17, 1943, through July 31, 1944, the period involved here, as the record clearly shows that food and refreshments were served to patrons of the club for profit to the taxpayer, and that such patrons were permitted to dance during that period to mechanical music. Prior to September 17, 1943, dancing privileges were not furnished, because such entertainment was not permitted under the service

liquor license issued to the taxpayer by the Oregon State Liquor Control Commission. Dancing was permitted only after the taxpayer obtained a restaurant license, under which license the Liquor Control Commission also permitted patrons of the establishment to dance. The only question of fact and of law in this case is whether the taxpayer in the operation and management of the Cozy or La Fiesta Club during the period involved furnished a "public" performance for profit within the meaning of the statute.

While it may be true that the Cozy Club as such was a non-profit organization in that it or its members realized no profit from its operations, it is difficult, if due consideration is given to the evidence, to conceive of any basis for the finding by the court below that the Cozy or La Fiesta Club during the period involved did not furnish a "public" performance for profit within the meaning of the statute. It must be remembered that the cabaret tax involved here was assessed against the taxpayer and not the Cozy or La Fiesta Club. The record shows that the taxpayer received as her remuneration all the profits from the sale of food, beverages, and from other sources, and paid all expenses incurred in the operation of the club. For all intents and purposes, she was the owner of the establishment operating under the guise of a private club, but which, we submit, was in reality a cabaret or other similar place open to the public.

At the time the management of the so-called club was

taken over, taxpayer purchased the physical equipment which had been owned by the prior manager and all receipts from operations, whether for so-called membership fees, dues, food, refreshments, or from other sources, became the personal property of the taxpayer. No individual member of the club, other than the taxpayer, received any profits whatever. The club had no bank account separate and apart from taxpayer's personal account. Money received from membership fees and from the sale of food, beverages and other sources was deposited either to taxpayer's general or special account. While it may be true that the membership fees thus deposited in her special account represented reimbursements to the taxpayer for money advanced to remodel and decorate the club premises, it is obvious that such expenditures actually represented improvements to her personal property used in the operation of the club, and that neither the club nor any of its members had any right, title or interest in such property.

The club facilities were advertised to the general public in several ways, one of which included the erection by the taxpayer of a neon sign outside the club building at a cost of \$169. Ordinarily, members of a private club are well aware of its location and functions, except special functions, of which they are usually advised by letter, and it can hardly be said that a private club would find it necessary to use this type of advertising unless the management desired to attract the general public.

Membership in the club at a cost of \$3 per year was easy to obtain. Application therefor was usually made by a person who had previously been brought to the club as a guest of a member, which application was passed on by the taxpayer and a Mrs. Sherman, who acted as secretary-treasurer of the club. The record clearly indicates that anyone who conducted himself in a satisfactory manner and who was not rowdy could become a member of the club by making an application. Enlisted personnel of the military forces were permitted to obtain a membership by the payment of only fifty cents. R. H. Lambeth, president of the club, testified that this policy was adopted because the enlisted personnel had a very limited number of places where they could take their girl friends to drink and dance. Obviously, the price of the membership was reduced for the sole purpose of attracting this potential profitable source of income because, as Mr. Lambeth testified, unless additional members were obtained, the establishment could not have remained in business. Many of the enlisted personnel obtained guest cards from the Military Police and the club was frequented by a large number of soldiers and sailors, who gained admission on their first visit by use of a guest card so obtained. Once admitted as a guest, they could go through the simple routine procedure of making application for membership and, if their conduct during the time of their first visit was good, they automatically became members. Mrs. Edith L. Deck, also a witness for the taxpayer, testified that she and

her husband became members of the club on their own applications. This tends to refute the testimony of the taxpayer that a candidate for membership had to be introduced by a member. The only privilege which a member obtained after being admitted to membership was the right to enter the club, to have a locker, and to enjoy its facilities. There is nothing in the record to show that a member had any of the usual rights or privileges which members of a private club ordinarily enjoy. The record as a whole indicates that taxpayer exercised no more discretion in admitting guests and passing on members than is exercised by the average doorman of an establishment that is operated openly as a cabaret. It is well known that doormen of many reputable cabarets and nightclubs refuse admittance to drunks, persons who are not properly dressed, persons who are not conducting themselves in a gentlemanly manner or individuals who have bad reputations.

The fact that members were permitted to bring into the club an unlimited number of guests also indicates that the club was operating as a cabaret or other similar public place. The record shows that each member was allowed to bring two guests but that if a member brought more than that number, a cover charge of seventy-five cents was made for each extra guest. This usually occurred on Friday and Saturday nights which are recognized as busy nights. On the basis of the cover charge collected from guests in excess of

two on those nights during the period involved, the record shows that an average of approximately forty extra guests were present on each of those nights. Since the seating capacity of the club dining room, where dancing was allowed, was eighty-seven persons, it will be seen that the number of members and guests present on those nights during the entire period more than equalled the full capacity of the club. Obviously, more guests were present than members. We submit that where this situation exists and continues over an extended period, such an establishment should be classified as a cabaret or other similar place, rather than a private club.

This is a case of first impression. However, it is not an isolated case insofar as the Bureau of Internal Revenue is concerned, and the final disposition of the problem presented here will have a very broad application. In many states, because of restrictions in local liquor laws, establishments that in other states would operate openly as cabarets can carry on only under the guise of private clubs. Such establishments are, of course, not bona fide clubs in any sense of the word. They are in fact cabarets which cater to the public generally. Any person who could patronize an average cabaret may become a patron by going through the ostensible process of becoming a member. Guest cards, however, are usually distributed so liberally in order to promote business that additional membership is not necessary. Even

though an establishment may fulfill the requirements necessary to be classed as a private club under local or state laws, we submit that this fact alone should not prevent the application of the cabaret tax where all the characteristics of a cabaret are present. In other words, the application of the federal cabaret tax should not be contingent upon the methods adopted by the several states in the administration of their liquor laws. If the state statutes are to govern, then uniformity in the administration of the federal cabaret tax will not be feasible.

The Bureau of Internal Revenue has been endeavoring to subject this type of business operation to the cabaret tax since it appears the intent of Congress that the tax should be applied thereto. The Bureau has consistently held that an organization is a cabaret or other similar place within the meaning of and subject to the tax imposed by Section 1700(e) of the Code where (1) food and refreshments are served for profit, (2) entertainment, such as dancing privileges, is provided, (3) the predominant purpose of the organization is the advancement of the commercial interest of the owner, manager or principal stockholder, (4) members have no equity in the profits or assets of the organization, and (5) local liquor laws are such that it is more advantageous for the organization to operate under the guise of a private club than openly as a cabaret. We submit that the facts in this case show that all of the above prerequisites are present.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the cabaret taxes and interest in the amount of \$6,538.21 for the period from September 17, 1943, through July 31, 1944, were correctly assessed and collected from the taxpayer and that the judgment of the District Court, insofar as it allows a recovery of taxes paid for that period, should be reversed.

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November, 1948.

**In the United States
COURT OF APPEALS**

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

IRENE ETHEL LAMBETH,

Appellee.

On Appeal from the United States District Court for the
District of Oregon.

**BRIEF FOR IRENE ETHEL LAMBETH,
Appellee.**

FILED

DEC 11 1948

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**In the United States
COURT OF APPEALS
for the Ninth Circuit**

UNITED STATES OF AMERICA,
Appellant,
vs.

IRENE ETHEL LAMBETH,
Appellee.

On Appeal from the United States District Court for the
District of Oregon.

BRIEF FOR IRENE ETHEL LAMBETH,
Appellee.

JURISDICTION

This appeal involves cabaret admissions taxes and interest thereon claimed to have been imposed by Section 1700(e) of the Internal Revenue Code, as amended by Section 622 of the Revenue Act of 1942, for the period May 1, 1943 until July 31, 1944 in the total

amount of \$6,917.91 (R. 9). The taxes in dispute were paid on September 18, 1944 (R. 8). A claim for refund was filed by the taxpayer on September 28, 1944 (R. 8). The claim was rejected by the Commissioner of Internal Revenue by notice dated February 11, 1946 (R. 8). On December 18, 1947, within the time provided by Section 3772 of the Internal Revenue Code, the taxpayer instituted an action in the District Court for the recovery of the taxes and interest paid (R. 2-4).

Jurisdiction was conferred on the District Court by Section 24, Twentieth, Judicial Code, Title 28, Section 41, Sub-division 20, U.S.C.A. Judgment was entered on April 27, 1948 (R. 17). Within sixty days thereafter and on June 26, 1948, notice of appeal was filed (R. 18-19). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 1700. TAX

There shall be levied, assessed, collected, and paid—

* * * * *

(e) (as amended by Section 622 of the Revenue Act of 1942, c. 619, 56 Stat. 798) Tax on Cabarets, Roof Gardens, Etc.—

(1) Rate.—A tax equivalent to.....per centum of all amounts paid for admissions, refreshment, service, or merchandise, at any roof garden, cab-

aret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The term "roof garden, cabaret, or other similar place" shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise. A performance shall be regarded as being furnished for profit for purposes of this section even though the charge made for admission, refreshment, service, or merchandise is not increased by reason of the furnishing of such performance. No tax shall be applicable under subsection (a) (1) on account of an amount paid with respect to which tax is imposed under this subsection.

(2) By whom paid.—The tax imposed under paragraph (1) shall be returned and paid by the person receiving such payments.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1700)

STATEMENT OF FACTS

The statement of facts set forth in appellant's brief, hereinafter in this brief referred to as "the Government", is so misleading and the inference drawn from the testimony so distorted that appellee, hereinafter in this brief

referred to as "the taxpayer", deems it necessary to present a summary of the evidence as follows:

The Cozy Club was originally incorporated in August 1929 under the laws of the State of Oregon as a non-profit corporation (Plaintiff's Exhibit No. 1). On December 9, 1935 supplemental articles of incorporation were filed with the Corporation Commissioner of the State of Oregon changing the situs of the Cozy Club to Portland, Multnomah County, Oregon. On December 14, 1935 certificate of filing of supplemental articles of incorporation was issued by the Corporation Commissioner of the State of Oregon (Plaintiff's Exhibit No. 1). From on or about December 14, 1935 to on or about November 4, 1937 the Cozy Club maintained club rooms on Burnside Street in Portland, Oregon. On or about November 7, 1937 the Cozy Club leased the premises at 1017 S. W. 6th Avenue, which were maintained as the club rooms until May 18, 1943 (Plaintiff's Exhibit No. 1), when the club quarters were moved to 929 S. W. Yamhill Street, Portland, Oregon (Plaintiff's Exhibits No. 1 and 2).

For some time prior to October 13, 1941 Jack Church was the manager of the Cozy Club and at this same time the taxpayer, who was then unmarried and whose name was Irene Ethel Roskie, was engaged in the restaurant business at Eugene, Oregon (R. 38-39). At this same time one of the persons most interested in the Cozy Club was Dr. Paul Stevens who had known the taxpayer in the State of Montana, as had another member of the club, A. A. Lambeth. Since the Cozy Club needed a new

manager, Mr. Church having entered the Armed Forces, Dr. Stevens contacted the taxpayer and persuaded her to take over the management of the Cozy Club (R. 39). From the records of the Cozy Club it appears that Mr. Church was receiving a fixed salary as manager of the club and was also receiving compensation for the rental of certain equipment in the premises at 1017 S. W. 6th Avenue, Portland, Oregon (Plaintiff's Exhibit No. 1). The taxpayer purchased the equipment which Mr. Church was then leasing to the Cozy Club and the taxpayer and the Cozy Club then entered into an arrangement for compensation for the taxpayer's managing the club whereby the taxpayer was to pay all expenses of the operation of the club rooms and was to receive all of the profits arising from the sale of food and beverages on the club premises. The taxpayer had no interest in the initiation fees and dues, these being retained by the Cozy Club for its own benefit (R. 40, 41, 49).

Both the lease on the premises at 1017 S. W. 6th Avenue and at 929 S. W. Yamhill Street were executed by the Cozy Club as lessee (Plaintiff's Exhibits No. 1 and 2).

The records of the Cozy Club show that the premises at 1017 S. W. 6th Avenue were not satisfactory as the facilities for serving food were inadequate (Plaintiff's Exhibit No. 1). The new premises at 929 S. W. Yamhill Street, Portland, Oregon, were more commodious and were better adapted to club purposes. They contained complete restaurant facilities, barroom, check room, dining room, kitchen, lockers and dance floor, the total area

of which was approximately 2,500 square feet. There was seating capacity for around 150 people (R. 46, 49). Access to the club room situated on the second floor was by stairway at the bottom of which was a swinging double door and at the top of which was another door which was operated by an electrical device with a push button on the inside (R. 47).

While the Cozy Club was located at 1017 S. W. 6th Avenue, the club maintained a separate account of all moneys paid by club members for dues and initiation fees (R. 49). It was necessary for the club before moving to 929 S. W. Yamhill Street, Portland, Oregon, to remodel and decorate the premises, the money for this remodeling and decorating being furnished by the club from initiation fees and dues from its members (R. 50). However, the Cozy Club did not have sufficient money to pay for all of the remodeling and decorating of the new club rooms so some money was personally loaned to the club by the taxpayer (R. 50). In the summer or fall of 1944 further remodeling was done to the premises at 929 S. W. Yamhill Street by the Cozy Club (R. 50). For the purpose of obtaining moneys to pay this remodeling dues of club members for the first six months of 1944 was fixed at \$3.00 each (Plaintiff's Exhibit No. 1). On moving to the club rooms at 929 S. W. Yamhill Street all initiation fees and dues were deposited in a special account in the name of the taxpayer from which account the taxpayer reimbursed herself for advances made on behalf of the club (R. 50, 51). Separate books of account were kept for the Cozy Club showing receipts

from initiation fees and dues and disbursements, and separate books of account were kept by the taxpayer (R. 51). All books of account of the Cozy Club were delivered to the Internal Revenue Department of the United States and are now in its possession and were not produced in the trial so that detailed statements of the receipts and disbursements of the Cozy Club are not available in this case (R. 51, 52).

At the time the taxpayer became manager of the Cozy Club on October 13, 1941 the only license that the club had from the Oregon Liquor Control Commission was a service license (see Chapter 464, Oregon Laws 1941) which permitted the licensee to mix and serve drinks prepared from liquor furnished by the patrons (R. 45). It should be specifically noted that this license and all licenses mentioned hereafter were issued in the name of the Cozy Club (R. 125). On September 17, 1943 the Cozy Club received a restaurant license from the Oregon Liquor Control Commission which permitted it to serve food, beer and light wines (Oregon Liquor Control Act, Laws 1933, Second Session, Chapter 17). Under a restaurant license dancing was permitted (R. 48).

There is no contention made by taxpayer but that the licenses from the Oregon Liquor Control Commission, service and restaurant, were not the type of licenses to be used by a private club, but were the type of licenses issued to one serving the public as such (see Oregon Liquor Control Act, Laws 1933, Second Session, Chapter 17, Section 24-118). Because the Cozy Club

was a private club and operated as such, difficulties arose between the club and the Oregon Liquor Control Commission and on January 21, 1945 the club's restaurant license was revoked "for the reason that the club refused service to persons entitled to patronize the premises of the licensee and operated the licensed premises as a private rather than a public establishment" (R. 128).

Initiation fees for regular members were \$3.00 and initiation fees for associate members, who must be members of the Armed Forces, was 50c and annual dues were fixed from time to time by the Board of Directors subject to a limitation of \$10.00 per year as provided by the By-laws of the Cozy Club (Plaintiff's Exhibit No. 1). All applications for membership were passed upon by the Board of Directors, but during a considerable period of 1943 and 1944 the President, R. H. Lambeth, no relative of the taxpayer, was working in a war industry and was not able to attend all meetings so that generally the applications for membership were passed upon by the other officers, namely the taxpayer, and Margaret Sherman, the Vice President (R. 57). Selectivity was used in admitting applicants to membership and many applicants were rejected (R. 58).

There were no restrictions on the number of guests that a member might bring to the club room but in order to discourage members from bringing more than two guests, a cover charge of 75c was made on Friday and Saturday nights for each extra guest (R. 93, 94). On the basis of the cover charge collected from members for guests in excess of two on Friday and Saturday nights

an average of approximately 40 extra guests were present on each of those nights out of a total seating capacity of 150 (R. 46, 135).

The District Court found as a fact that during the period involved the taxpayer was managing the Cozy Club as a private club organized under the laws of the State of Oregon as a non-profit corporation; that the club was not open to the public but open only to members and their guests and that taxpayer was not operating a roof garden, carbarret or other similar place furnishing a public performance for profit; that the taxpayer filed a timely claim for refund of the taxes erroneously assessed against her and paid under protest (R. 14, 15, 16). Judgment was therefore entered for refund to the taxpayer of \$6,917.91 with statutory interest (R. 17).

SUMMARY OF ARGUMENT

I.

The judgment is based upon findings of fact which have the force of the verdict of a jury. These findings are not reviewable except to determine whether supported by substantial evidence and not reversible unless clearly erroneous.

II.

In statutes relating to taxation words employed therein must be given their accepted and ordinary meaning, and all doubts must be resolved in favor of the taxpayer and where the taxing statute is clear and unam-

biguous no resort can be had to enlarge the scope thereof by interpretative regulations or unpublished ideas of the Treasury Department.

III.

The evidence clearly discloses that during the period involved the taxpayer did not furnish a public performance at a cabaret or other public place.

ARGUMENT

I.

District Court's Findings of Fact Are Conclusive

A fair consideration of the record herein can leave no doubt whatever that the findings of fact are not only supported by substantial evidence but are supported by the clear preponderance of the evidence, and in fact the Government has produced no evidence whatsoever which would permit contrary findings.

Rule 52 (a) of the Federal Rules of Civil Procedure in part provides:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .”

In *Wittmayer v. United States*, 118 F. (2d) 808, 811 (9th Cir.), this court said:

“The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless

some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand.

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong . . . is but the formulation of a rule long recognized and applied by courts of equity. *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. (2d) 46, 47.

"As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

II.

Rules of Construction of Statutes Relating to Taxation

It is axiomatic that the intention of the Legislature with respect to tax statutes must be ascertained from the language of the act itself and that no tax can be imposed without clear and express language for that purpose.

"Unless the context shows that they are differently used, the words employed are to be given their ordinary meaning, and the effect of the statute is not to be extended by implication or forced construction beyond the clear meaning or import of the language used . . . " 51 Am. Jur. 362.

"Language used in tax statutes should be read in the ordinary and natural sense." *Helvering v. San Joa-*

quin Fruit & Investment Co., 297 U. S. 496, 499, 56 S. Ct. 569, 570.

“The literal meaning of the words employed in tax statutes is most important, and the general rule requiring adherence to the letter in construing statutes applies with peculiar strictness to tax laws.” 51 Am. Jur. 362.

In the case of *U. S. v. Merriam*, 263 U. S. 179, 187, 44 S. Ct. 69, 71, we read:

“On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211. The rule is stated by Lord Cairns in *Partington v. Attorney General*, L. R. 4. H. L. 100, 122:

‘I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.’ ”

"Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer . . ." 51 Am. Jur. 367.

"It is a familiar canon in the interpretation of tax laws that they are to be construed strictly. If the right to the tax is not conferred by the plain words of the statute it is not to be extended by implication. If it is not within the letter it is vain to invoke the spirit of the tax law." *Hill v. Treasurer*, 229 Mass. 474, 118 N. E. 891.

In *Hecht v. Malley*, 265 U. S. 144, 156, 44 S. Ct. 462, 466, the court stated:

"Nor does the language of the act in this respect call for the application of the established rule that in the interpretation of statutes levying taxes their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the Government and in favor of the taxpayer."

As in *Hecht v. Malley*, *supra*, the taxing statute is so clear that there is no necessity for resorting to rules of interpretation, and the word "public" as used in the statute, "public performance" and "public place", must be given its ordinary meaning. We doubt if there is any one word in the English language that has a more generally accepted meaning than the word "public", and the phrase "public place" is universally understood as meaning a place where all persons have a right to go and be. This is the definition adopted by all standard dictionaries.

"The phrase 'a public place' has received a construction by this court and has been construed to mean a

place where the public has a right to go and be, and does not include all places where people may be congregated together." *State v. Welch*, 88 Ind. 308.

In interpreting earlier cabaret tax statutes Judge Underwood in *Deshler Hotel Co. v. Busey*, 36 F. Supp. 392, 394, affirmed by the Circuit Court of Appeals, 6th Circuit, 130 F. (2d) 187, stated:

"In the main, the terms of the statute are clear and unambiguous. It is readily apparent that it contains four essential requirements and that all of these must be present before the tax can be required . . .

The second requirement of the statute is that the performance in question must have been a public performance . Here again the law is clear and not subject to administrative interpretation. The expression 'public performance' has an ordinary and accepted meaning, readily understandable. The context does not indicate that any other meaning is intended and the term is not defined by the regulation. We may therefore accept the intent of Congress as being that the ordinary meaning of the phrase shall be used."

In *Schuster's Wholesale Produce Co. v. United States*, 49 F. Supp. 909, 911, District Judge Dawkins in construing the 1941 cabaret tax statute stated:

"Judge Underwood in the absence of a definition by the statute itself of the term 'public performance' applied the ordinary dictionary meaning and found that under the facts of that case there was such a performance."

Nor can the Government sustain the levying of the tax in this case by enlarging the scope thereof by interpretative regulations or unpublished ideas of the Trea-

sury Department as to Congressional intent.

"Where the language of a taxing statute is plain and unambiguous there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute."

Busey v. Deshler Hotel Co. (C.C.A. 6th Cir.), (supra).

See also *Iselin v. U. S.*, 270 U. S. 245, 250, 46 S. Ct. 248, 250, where Judge Brandeis stated:

"The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute but in effect an enlargement of it by the court, so that what was omitted, presumably by inadvertance, may be included within its scope. To supply omissions transcends the judicial function."

On page 20 of its brief the Government states that to carry out the intent of Congress the Bureau of Internal Revenue has been endeavoring to tax organizations where five elements are present, to-wit:

"(1) food and refreshments are served for profit, (2) entertainment, such as dancing privileges, is provided, (3) the predominant purpose of the organization is the advancement of the commercial interest of the owner, manager or principal stockholder, (4) members have no equity in the profits or assets of the organization, and (5) local liquor laws are such that it is more advantageous for the organization to operate under the guise of a private club than openly as a cabaret."

Obviously the unpublished ideas of the Internal Revenue Department as to the intent of Congress have

absolutely no bearing on the question before this court. It is interesting to note, however, that even under the tests laid down by the Internal Revenue Department the taxpayer would not be subject to the tax in this case since the Liquor Laws of the State of Oregon are such that it is no more advantageous for an organization to operate as a private club than openly as a cabaret. In fact it is clear from the evidence that the Liquor Laws of the State of Oregon are such that it is more advantageous and easier to operate as a cabaret than as a private club.

It is clear that if Congress had intended to tax any place where dancing was permitted and where a profit accrued to some person as a result thereof, such as in the instant case, Congress would have clearly indicated such intention by eliminating the word "public" which occurs twice in the Act. This would not in any manner affect private clubs, since these clubs are not operated for profit.

III.

During the Period Involved the Evidence Clearly Discloses That the Taxpayer Did Not Furnish a Public Performance for Profit at a Cabaret or Other Public Place

The Government contends that the imposition of the cabaret tax by the Government was proper on the theory that a public performance for profit occurred at 929 S.

W. Yamhill, Portland, Oregon, and that this establishment was a cabaret or other public place where music and dancing privileges were afforded the patrons thereof in connection with the serving or selling of food or refreshments. The gist of this argument is epitomized on page 15 of the brief as follows:

“For all intents and purposes, she (the taxpayer) was the owner of the establishment operating under the guise of a private club, but which, we submit, was in reality a cabaret or other similar place open to the public.”

To put it plainly the Government is contending that the taxpayer was operating a public cabaret and that the Cozy Club was simply a shield, as it were, to give color to the contention that patrons of the cabaret were not subject to the cabaret tax.

The pertinent portions of Sec. 1700 (e) of the Internal Revenue Code, as amended, are as follows:

“A tax . . . for admission, refreshment, service, or merchandise at any roof garden, cabaret or other similar place furnishing a public performance for profit . . . The term roof garden, cabaret or other similar place shall include any room in any hotel, restaurant, hall or other public place where music and dancing privileges . . . are afforded the patrons in connection with the serving or selling of food, refreshments or merchandise. . . .”

It is clear that the test of whether the tax is or is not applicable is whether or not there was a public performance in a public place. The question, then, of whether the Cozy Club was or was not a bona fide private club is not controlling, the only issue being was or

was not the establishment at 929 S. W. Yamhill, Portland, Oregon, open to the public. It is therefore only necessary for the taxpayer to sustain the proposition that the establishment at 929 S. W. Yamhill was not open to the public in order to recover the tax assessed. Obviously if the Cozy Club was a private club, as the term is commonly understood, the club would not be open to the public and there is no theory on which the tax could be assessed.

That the Cozy Club was an existing private club is amply sustained by the evidence and in fact there is absolutely no evidence which would justify the Government in making the bland statement that the taxpayer was operating a cabaret open to the public under the guise of a private club.

In any private social club there must be club facilities and if the club is to succeed it must provide itself with good personnel to operate the club. The club facilities were provided by the Cozy Club itself and not by the taxpayer, (Plaintiff's Exhibit No. 2). It is true that the evidence shows the taxpayer purchased certain equipment from Mr. Church when the club was located on the premises at 1017 S. W. 6th, (R. 39) but it is equally clear that when the club rooms were moved to 929 S. W. Yamhill the Cozy Club was the lessee of the premises and assumed the burden and obligation of remodeling the premises and making them suitable for the use of the club, (Plaintiff's Exhibit No. 2, R. 50). The record is clear that the Cozy Club had been established as a non-profit corporation in Oregon since 1935, (Plaintiff's

Exhibit No. 1). It is also clear that the taxpayer did not seek the position of manager but was sought out by Dr. Paul Stevens, an active and interested club member. (R. 39). There is nothing strange about the business relationship between the taxpayer and the Cozy Club. It was probably, as the minutes of the Cozy Club indicate (Plaintiff's Exhibit No. 1), a most satisfactory arrangement since it insured the members of the club of well-operated club rooms without the necessity of having a complicated bookkeeping system and without the fear of operating at a loss. Obviously if the taxpayer rendered unsatisfactory service or charged exorbitant rates for food, the mixing of beverages, etc., her employment would be terminated.

The Cozy Club as a club was financed by initiation fees and dues of its members in which the taxpayer had absolutely no interest (R. 40, 41, 49). This was the situation when the club was located at 1017 S. W. 6th and likewise the situation when the club was located at 929 S. W. Yamhill, and there is absolutely no basis for the statement in the Government's brief that at the time the taxpayer took over the management the taxpayer became entitled to all receipts from operations whether from membership fees, dues, etc.

The Cozy Club as such maintained books of account in which all receipts derived by the club from dues and initiation fees and all moneys disbursed were accurately recorded (R. 49). These books of account of the Cozy Club have been in the possession of the Government at least since the spring of 1947 (R. 51, 52), and should

have been produced by the Government at the trial of this case if the Government was going to take the position it does now that the Cozy Club had in fact no existence. While the books have been withheld by the Government the amount of money handled by the Cozy Club was substantial, and, as the taxpayer said, can be arrived at even without the books, since we have a complete roster of the members each year (Plaintiff's Exhibit Nos. 3 and 4), know the initiation fee, and know the amount of the annual dues, (Plaintiff's Exhibit No. 1). All of this money derived from initiation fees and dues was expended by the Cozy Club for remodeling and re-decorating and improving the club facilities (R. 40). The taxpayer was not obligated to expend any money for remodeling, decorating and providing facilities (R. 50). It is true that the taxpayer did make advances to the Cozy Club for this purpose with the expectation that she would be repaid out of dues and initiation fees (R. 50).

Let us consider the question from a negative point of view. At all times since the assessment was levied against the taxpayer the Government has had access to and during a large portion of the time has had actual possession of the records of the Cozy Club itself. These records disclose the names and addresses of all employees of the taxpayer, the names and addresses of all members of the club, of which practically all the civilian members were residents of Portland, Oregon. If the Cozy Club were, to use a colloquial but expressive term, a "phoney", you may be sure that the Government would have had numerous witnesses, who according to the records were club members or employees, testifying on behalf of the

Government, yet not one single person, either a purported member of the club or an employee, was produced as a witness by the Government. The Government has also failed to explain or to offer any plausible reason why the Cozy Club on May 1, 1943, suddenly ceased to be a private club and became a public cabaret.

The Government criticizes the method that was used in admitting members to the club, particularly the method used in admitting associate members who were required to be members of the Armed Forces. The Government states that membership in the club at a cost of \$3.00 a year was easy to obtain and it also criticizes the amount of the annual dues and the initiation fee for associate members. Perhaps the requirements for admittance to membership were not as exacting as in some of the more exclusive clubs in Portland, but there were certain requirements as to qualification for membership. Affirmative action had to be taken before a person could be admitted to membership, and there was an element of selectivity (R. 56—59, 78, 104, 105, 118, 121). The difference between the requirements for admittance to a so-called exclusive social club and the requirements for admittance to the Cozy Club is solely a matter of degree. We venture to suggest that it was no more difficult to obtain membership in the so-called "popular" social clubs such as the Elks or Eagles than it was to the Cozy Club, and yet the Government would never contend that the bar services customarily maintained by the Elks or the social dances conducted by the Eagles are subject to cabaret taxes, even though members are privileged to and customarily do invite numerous guests.

We further venture to suggest that if the initiation fees had been \$25.00 instead of \$3.00 the Government would not maintain that the Cozy Club was not a private club. In short, in the government view, if a group of people associate themselves together for the purpose of forming a club and make the initiation fees and dues so large that only a few people have the means to join such a club, they are exempt from taxation; whereas if people who do not have the means to join a high-cost so-called exclusive club associate together under modest initiation fees and dues and provide an establishment where they can have social gatherings, can dance, can have liquid refreshments mixed at a bar, and can take their friends and associates, and their girl friends, if you please, and where only these members and their invited guests can obtain admittance, ^{then} ~~than~~ these particular people cannot be considered as forming a private social institution but must be considered as operating a public cabaret and therefore taxable.

We frankly concede that if anyone could gain admittance to the club by simply paying a stated fee that this fee should be considered as an admission fee and that the premises would be a public place. The payment of money to get into any particular building is admittedly no proof of the private character of the place for which admittance is paid. In order to constitute a private, as contrasted with a public place of entertainment there must be some definite restrictions on the right of the public as such to enter. There must be some element of selectivity and this selectivity is found in the opera-

tions of the Cozy Club. It is true that a less exacting standard was adopted as to members of the Armed Forces, but there was selectivity.

The record shows that officers were admitted to membership in the Aero Club as associate members (R. 104). So is the Cozy Club any different because it admitted as associate members, members of of the Armed Forces holding rank less than ensign or second lieutenant? Actually there was selectivity even in the admittance as associate members of persons who were in the Armed Forces of the United States, and it is a gross misstatement and not supported in any particulars for the Government to state that the Cozy Club exercised no more discretion in admitting guests and passing on members than was exercised by the average doorman of a public cabaret.

As heretofore stated, the sole issue in this case is not whether the Cozy Club was or was not a private club, but whether the premises at 929 S. W. Yamhill were open to the public. We submit that the evidence is uncontradicted that the premises at 929 S. W. Yamhill were not a "public place".

Edith L. Deck, a member of the Cozy Club, testified as follows (p. 77-78 of Trans. of Record):

"Q. Will you tell the Court, please, as to whether or not in its operations and particularly during the period from April 1st or May 1st, 1943, which was approximately half a month before you moved to 929 Southwest Yamhill, from that date up until September 1, 1944, do you know who could get into the clubrooms?

A. Only those who were members or those who made application to become—that is, those who applied for membership.

Q. Who were guests?

A. Guests could come in if they were brought in by a member.

Q. Particularly directing your attention to 929 Southwest Yamhill, could anyone get into the clubrooms or be permitted in there who was not a member or guest of a member.

A. I would say no.

Q. Your answer is no?

A. Yes.

Q. Have you ever had any occasion to see people try to get into the clubrooms that were turned away?

A. Very often.

Q. Was that a fairly common occurrence?

A. I would say it was during the wartime."

C. B. Marx, a member of the Cozy Club, testified as follows (p. 100-101 of Trans. of Record):

"Q. Were you a member during 1943 and 1944 when Mrs. Lambeth was acting as manager?

A. I must have been because I always have been a member ever since it was—

Q. Mr. Marx, during the time of the operation of the club on Southwest Yamhill, was it open to anybody or was it open only to members?

A. Only to members.

Q. Do you know that of your own personal knowledge.

A. Yes.

Q. Have you ever seen an occasion, Mr. Marx, when people were refused admittance who were not club members?

A. Yes, I have.

Q. Have you ever seen an occasion when people who were not club members got in, where they

were not guests of some club member?

A. No."

R. H. Lambeth, President of the Cozy Club, no relative of taxpayer, testified as follows (p. 106 of Trans. of Record):

"Q. Do you know whether or not the question of judging applications was done in a fair manner, so that those people that you thought were entitled to join got in and those who were not, did not?

A. Well, from the conduct of the club, I believe it was done in a fair manner.

Q. Was it such a thing that anybody that made application got in, or was there selectivity of the people that got in?

A. There was selectivity of the people."

Lanice Shanahan, an employee of taxpayer, testified as follows (p. 110-111 of Trans. of Record):

"Q. During the period of time you were there, will you state whether or not the LaFiesta or Cozy Club was operated as a private or a public club?

A. Private.

Q. How do you know that?

A. People that were not members were not allowed in; had to be a member to be allowed in."

Margaret Sherman, Vice President of the Cozy Club, testified as follows (p. 117 and 118 of Trans. of Record):

"Q. Were you an officer at any time when they were up on Yamhill Street?

A. That is when I became an officer.

Q. What can you say as to the practice or the method of operation of the club, specifically from May 1st, 1943, to September 1st, 1944, as to whether or not it was open to the public, or whether it was operated as a private club and open solely to mem-

bers and members when accompanied by guests—guests when accompanied by members, rather.

A. We were strictly a membership club, open only to members and their guests.”

* * * * *

“Q. Just tell the Court what the machinery was?

A. Members would come in and we would take their application for others who wished to be a member, and then we would decide, and if they were eligible to become members we took them in.

Q. Did everybody who made an application become a member?

A. No, sir.

Q. Did you use a degree of selectivity in ascertaining who should or should not be members?

A. We did.

Q. Other than law enforcement agents, up to 1945, do you know whether or not any person came—Do you know of any person coming to the club who was a non-member and who did not come as a guest?

A. I certainly do not.”

If there is any question but that the Cozy Club was not open to the public it is put to rest by the testimony of Frederick C. Aldrich, the only witness produced by the Government who testified as to substantial facts relative to the operations of the Cozy Club. Because this was a witness produced by the Government itself and a disinterested party, we believe the testimony of this witness is determinative of the case.

Mr. Aldrich testified in part as follows (p. 125-128 of Trans. of Record):

“Q. As I understand it, it is your testimony here that the Cozy Club had a service license and a restaurant license at 929 Southwest Yamhill Street, is that correct?

A. That is right.

Q. And the applicant that had that license was the Cozy Club and Irene E. Lambeth, Manager, was it not? Or was it just the Cozy Club, Irene E. Lambeth, Manager?

A. By Irene Lambeth, Manager.

Q. In other words, the license was in the name of the Cozy Club and it just recited on there 'Irene E. Lambeth, Manager', isn't that correct?

A. That is right.

Q. I think your records will also show, will they not, that from the 20th of January, 1945, until the 14th of February, 1945, this club was without any license?

A. May I have those dates again?

Q. I think it was on or about the 20th or 21st day of January, 1945, to on or about the 14th day of February, 1945?

A. That is right.

Q. Do I have my dates exactly right?

A. The license was canceled January 21, 1945, and reinstated February 14, 1945.

Q. February 14, 1945?

A. Yes.

Q. Now, sir, is it not a fact that the reason why that license was canceled was because the Commission claimed that it, the Cozy Club, was being operated as a private club?

A. That is right.

Q. In other words, the only license that they had, the Cozy Club, to operate was a service license and a restaurant license?

A. That is right.

Q. That type of license compelled them to accept anybody from the public that conducted themselves in a reasonable decorous manner?

A. That is right.

Q. And since the Cozy Club was only operated as a private club, they revoked the license because they were doing what the Liquor Com-

mission thought they were not entitled to do, to-wit, operate a private club, is that correct?

A. That is right.

Redirect examination by Mr. Hamilton:

Q. I would like to ask you, Mr. Aldrich: The reason that the club was closed up and the reason they said they were operating as a private club was because, in December, 1945, an inspector, I believe of the Liquor Commission, went to the club and was refused admittance, isn't that correct?

A. That is right.

The Court: Who?

Mr. Hamilton: A liquor investigator, your Honor.

Q. And when you say that the license was revoked in January because it was operated as a private club, what you actually mean is that—Did you mean that it was attempted to be operated as a private club? Did you mean that it was attempted to be operated as a private club when it was not licensed to do so?

Mr. Vosburg: Just a minute, Your Honor.

The Court: Read the question.

(Question read)

The Court: Answer.

A. I have no way of telling how the club was operating except from our investigator's report and the reason the Commission gave for revoking the license. The license was revoked for the reason that the club refused service to persons entitled to patronize the premises of the licensee and operated the licensed premises as a private rather than a public establishment.

The Court: What have you just read from?

A. Read from the official record in the file of the Cozy Club.

The Court: The record of the Oregon Liquor Control Commission?

A. Yes.

Mr. Vosburg: That is dated when?

A. That is dated January 19, 1945."

CONCLUSION

The Government has conceded in its brief that cabaret taxes in the amount of \$379.70 plus statutory interest were illegally collected for the period from May 1, 1943 to September 17, 1943. It is respectfully submitted that the cabaret taxes and interest in the amount of \$6,538.21 for the period from September 17, 1943 through July 31, 1944 were likewise illegally assessed and collected from the taxpayer, and that the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

ARTHUR S. VOSBURG

WILLIAM H. HEDLUND

Attorneys for Appellee

No. 12027

United States
Court of Appeals
for the Ninth Circuit

ESTATE OF FRANK K. SULLIVAN, deceased,
by FLOYD K. SULLIVAN, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review a Decision of The Tax Court
of the United States

FILED
OCT 5 - 1948

PAUL P. O'BRIEN,

No. 12027

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

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For Respondent:

DOUGLAS L. BARNES, Esq.

Docket No. 12476

ESTATE OF FRANK K. SULLIVAN, Deceased,
By FLOYD K. SULLIVAN, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

Nov. 12—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 12—Request for hearing at Los Angeles filed by taxpayer.

Nov. 13—Copy of petition served on General Counsel.

Dec. 23—Answer filed by General Counsel.

Dec. 31—Copy of answer served on taxpayer—Los Angeles, Calif.

1947

Sep. 30—Hearing set Dec. 1, 1947 at Los Angeles, Calif.

Dec. 2 & 3—Hearing had before Judge Disney on merits. Stipulation as to facts filed. Briefs due Jan. 15, 1948—replies Feb. 10, 1948.

Dec. 30—Transcript of hearing of Dec. 2, 1947 filed.

Dec. 30—Transcript of hearing of Dec. 3, 1947 filed.

1948

Jan. 13—Brief filed by taxpayer.

Jan. 14—Motion for extension to Jan. 30, 1948 to file original briefs and Feb. 23, 1948 to file reply brief filed by General Counsel. 1/15/48 granted.

Jan. 30—Brief filed by General Counsel.

Jan. 30—Petitioner's brief served on General Counsel.

Feb. 24—Reply brief filed by General Counsel.

Feb. 24—Reply brief filed by taxpayer — copy served.

May 27—Findings of fact and opinion rendered. Disney J. Decision will be entered for the respondent. Copy served 5/28/48.

May 27—Decision entered, R. L. Disney J. Div. 4.

Aug. 2—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.

Aug. 2—Proof of service filed.

Aug. 2—Praeipie filed with proof of service thereon. [1 *]

The Tax Court of the United States

Docket No. 12476

ESTATE OF FRANK K. SULLIVAN, deceased,
by FLOYD K. SULLIVAN, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau Symbols LA:ET:90D:NAB) dated August 15, 1946, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 327 Burlingame Avenue, Los Angeles 24, California; that he was formerly the executor of the Estate of Frank K. Sullivan, deceased, and is the person to whom all [2] communications in respect to said estate have been directed by the Treasury Department. Said Frank K. Sullivan died on January 9, 1944. Probate of said estate of said decedent has been concluded, petitioner herein was discharged as such executor on June 4, 1945, and all of said estate has been distributed by decree of the Superior Court of the State of California in and for the County of Los Angeles. The estate tax return (Form 706) for said estate was filed with the Collector for the Sixth District of California. The

applicable valuation date was the date of death of the decedent.

2. The Notice of Deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on August 15, 1946.

3. The taxes in controversy are the estate taxes of said estate and in particular, the Commissioner's determination of said taxes which, according to said Notice of Deficiency, discloses a deficiency of \$18,963.17, without application of the credit for state inheritance taxes in the amount of \$460.75.

4. The determination of taxes set forth in said Notice of Deficiency is based upon the following errors and each of them: [3]

(a) The Commissioner of Internal Revenue erred in including in the value of the gross estate of decedent, and in failing to except and exclude from such value, the value, amounting to \$25,013.80 at the time of the death of decedent, of the interests of Hattie B. Sullivan, surviving spouse and widow of decedent, in certain United States Savings Bonds, Series G, and interest thereon, all owned and held at said time by decedent and Hattie B. Sullivan as tenants in common and not as joint tenants, in equal undivided shares and interests, such shares and interests of Hattie B. Sullivan then being her sole and separate property.

(b) The Commissioner of Internal Revenue erred in including in the value of the gross estate of decedent the value, amounting to \$37,748.75 at the time of the death of decedent, of the interests of Hattie B. Sullivan in certain real property and

in personal property exclusive of the bonds and interest thereon referred to in the foregoing paragraph (a), all of which real and personal property was owned and held at said time by decedent and Hattie B. Sullivan as tenants in common and not as joint tenants, in equal undivided shares and interests, such shares and interests of Hattie B. Sullivan then being her sole and separate property.

(c) The Commissioner of Internal Revenue erred in including in the value of the gross estate of decedent the value, amounting to \$33,526.54 at the time of the death of decedent, of certain personal property, to wit, securities, acquired by gift during the lifetime of decedent, by Floyd K. Sullivan, the son of decedent and Hattie B. Sullivan, and not owned or held by decedent at the time of his death and not includible in said gross estate under any of the subdivisions or provisions of Section 811 of the Internal Revenue Code; said gift having been made by decedent and Hattie B. Sullivan (now living), who, at the time of said gift, owned and held said property as joint tenants, in equal undivided shares and interests constituting separate property of the respective donors.

(d) The Commissioner of Internal Revenue erred in finding and determining that the property and property interests hereinabove referred to in paragraphs (a), (b) and (c) of these assignments of error, aggregating in value \$96,289.09 at the time of the death of decedent, were interests of which decedent, during his lifetime, to wit, on November 19, 1943, and November 24, 1943, made transfers in

contemplation of his death within the meaning of Section 811 (c) of the Internal Revenue Code.

(e) The Commissioner of Internal Revenue erred in finding and determining that the interests of decedent and Hattie B. Sullivan, his wife, in the bonds hereinabove referred to in paragraph (a) of these assignments of error, and interest thereon, aggregating in value \$50,027.60 as of the time of the death of decedent, were, at said time, interests in property held as joint tenants by decedent and Hattie B. Sullivan, within the meaning of Section 811 (e) of the Internal Revenue Code, thereby subjecting to estate taxes under said section the interests of Hattie B. Sullivan, of the value of \$25,013.80, referred to in said paragraph (a).

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) Decedent and Hattie B. Sullivan were married April 6, 1892, in Minneapolis, Minnesota, and remained husband and wife until decedent's death on January 9, 1944.

(b) Decedent was and had been for a long period of time prior to moving to California, engaged in the retail coal business in Minneapolis. Said business was solely owned by him and conducted under the trade name of Sullivan Coal Company.

(c) In 1918 decedent sold his entire business to the C. Reiss Coal Company and thereafter for all intents and purposes retired from active business except for occasionally assisting said buyer from time to time in setting up and organizing its Min-

neapolis office of which decedent's business formed the nucleus.

(d) Over a long period of time prior to decedent's selling out his business he and his surviving spouse, Hattie B. Sullivan, had consistently spent at least three months during the winter in Los Angeles. The decedent and his surviving spouse moved to California and made it their permanent home and domicile in 1922. [7]

(e) Decedent received for the sale of his business the sum of approximately \$100,000 which he thereafter proceeded to invest in apartment houses and income property and in mortgages and trust deeds with various firms located in Los Angeles both before and after making California the permanent domicile of him and his wife.

(f) All property acquired by decedent and his wife after said business was sold, and both prior and subsequent to the time they established their domicile in California, as aforesaid, was originally acquired and held by them as joint tenants with right of survivorship, and said property was thereafter owned and held by decedent and his wife as such joint tenants until disposed of or partitioned, divided and commuted into property owned and held by them as tenants in common, as hereinafter stated.

(g) The income from all properties so held by decedent and his wife was likewise held in joint-tenancy bank accounts in the names of decedent and his wife; and one-half of all said income from said joint tenancy property was included in the indivi-

dual tax returns (both federal and state) of said decedent and his wife filed each year in [8] which a tax was due thereunder and the taxes paid from the joint bank accounts of decedent and his wife.

(h) On or about the 19th day of November, 1943, decedent and his wife (who is now living) made gifts of certain securities then owned by them as joint tenants, to Floyd K. Sullivan, their son, and thereupon said Floyd K. Sullivan became the sole and absolute owner of said securities. The fair market value of said securities as of the date of death of said decedent was \$33,526.54, one-half of which represented the value of a gift from decedent and the remaining one-half of which represented the value of a gift from Hattie B. Sullivan. The Commissioner of Internal Revenue has determined that the entire value of said gifts, to wit, \$33,526.54, was and is includible in the value of the gross estate of decedent under the provisions of Section 811 (c) of the Internal Revenue Code.

(i) On or about the 24th day of November, 1943, decedent and his wife, Hattie B. Sullivan, made and entered into a certain agreement in writing dated the 24th day of November, 1943, [9] (a copy of which is attached hereto, marked Exhibit B and made a part hereof) wherein and whereby they partitioned, divided and commuted all of the property, both real and personal, then owned and held by them as joint tenants, being all of the property then belonging to or held by them, or either of them, into property owned and held by them as tenants in common, in equal undivided shares and interests,

said shares and interests constituting separate property of the respective parties. Concurrently with the execution of said agreement, and pursuant to the advice of Title Insurance and Trust Company of Los Angeles, California, as to the best method of establishing the results of said agreement of record insofar as it related to real property, the parties to said agreement made, executed and delivered to decedent grant deeds covering the several parcels of real property affected by said agreement, and said parties likewise at said time made, executed and delivered to decedent written assignments of deeds of trust affected by said agreement; and thereafter, and as a part of the same transaction above described, decedent made, executed and delivered to Hattie B. [10] Sullivan grant deeds covering an undivided one-half interest in and to each of said parcels of real property, and at the same time decedent made, executed and delivered to Hattie B. Sullivan written assignments covering an undivided one-half interest in and to each of said deeds of trust; and that said deeds and assignments were thereafter duly recorded in the office of the County Recorder of Los Angeles County, California.

(j) At the times referred to in the foregoing paragraph (i) the life expectancy of Hattie B. Sullivan exceeded that of said decedent. The consideration for the release and extinguishment and for the transfer, if any, of the rights and interests of decedent under and pursuant to said agreement and the deeds and assignments executed, as aforesaid,

was the release and extinguishment and the transfer, if any, of identical rights and interests of Hattie B. Sullivan, and said rights and interests of Hattie B. Sullivan were of no lesser value, but, on the contrary, to the extent of the value of the greater life expectancy of Hattie B. Sullivan, as aforesaid, were of greater value than the rights and interests of decedent so released, extinguished or transferred; [11] and the partition, division and commutation of the property of decedent and Hattie B. Sullivan, as aforesaid, was a bona fide sale from each of them to the other for an adequate and full consideration in money's worth.

(k) Said agreement covered and related to certain United States Savings Bonds, Series G, and interest thereon, of the fair market value of \$50,-027.60 as of the date of death of decedent, and to other property, real and personal, of the fair market value of \$75,497.50 as of said date. The Commissioner of Internal Revenue has determined that the entire value of said bonds and interest thereon, and of such other property, aggregating \$125,-525.10, was and is includible in the value of the gross estate of decedent, said Commissioner having found that the value of the undivided one-half interest of Hattie B. Sullivan in said bonds and interest thereon and in such other property, to wit, \$62,762.55, was and is so includible in said gross estate under the provisions of Section 811 (c) of the Internal Revenue Code, and that the full value of said bonds and interest thereon, to wit, \$50,-027.60 including the interest of Hattie [12] B. Sul-

livan therein, of the value of \$25,013.80, was and is also includible in said gross estate under the provisions of Section 811 (e) of said Code.

1. All of the property owned or held by decedent and Hattie B. Sullivan, as joint tenants, as hereinbefore alleged, was owned and held by them in equal undivided shares and interests, and such shares and interests of said joint tenants were owned and held by them, respectively, as his or her separate property and not as community property; and all of the property owned or held by decedent and Hattie B. Sullivan, as tenants in common, as hereinbefore alleged, was owned and held by them in equal undivided shares and interests, and such shares and interests of said tenants in common were owned and held by them, respectively, as his or her separate property and not as community property.

(m) An undivided one-half interest in the property given to Floyd K. Sullivan, as hereinbefore alleged, was given to him absolutely and free of the claims, rights, titles and interests of all other persons, by Hattie B. Sullivan, his mother, who, [13] at the time of said gift was the sole and absolute owner of said undivided one-half interest. Said gift took effect during the lifetime of the decedent, but neither the gift of said interest, nor the transfer of any property constituting the subject of said gift, was made by the decedent, and the decedent was not the owner or holder of any of said property or of any right, title or interest therein or thereto, or in or to any income therefrom, at the time of his death. The value of said interest,

to wit, \$16,763.27 was not, therefore, includible in the value of the gross estate of the decedent, and the inclusion thereof in said estate is one of the errors of which petitioner complains.

(n) The remaining one-half interest in the property given to Floyd K. Sullivan, as hereinbefore alleged, was given to him by the decedent prior to decedent's death, and said gift took effect in possession and enjoyment during the lifetime of the decedent. The decedent did not, at any time after said gift became effective, have or retain the possession or enjoyment of any of said property, or the right to any income therefrom, or the right, either alone or in conjunction with any person, to [14] designate the persons who should possess or enjoy said property or any income therefrom, and neither said gift nor any transfer of said property, was made in contemplation of the death of the decedent. The value of said interest and property, to wit, \$16,763.27, was not, therefore, includible in the value of the gross estate of the decedent, and the inclusion thereof in said estate is one of the errors of which petitioner complains.

(o) None of the property or property interests owned or held by Hattie B. Sullivan subsequent to or resulting from said agreement dated November 24th, 1943, or any of the aforesaid deeds or written assignments, was received or acquired by her as a gift or transfer in contemplation of or intended to take effect in possession or enjoyment at or after the death of the decedent, and the decedent did not, at any time after said agreement and said deeds and assignments became effective, or at the time of

his death, have or retain the possession or enjoyment of any of said property or interests, or the right to any income therefrom, or the right, either alone or in conjunction with any person, to designate the persons who should possess or enjoy said property or interests or any income therefrom; and none of [15] said property or property interests was held or owned, at the time of the death of the decedent, by Hattie B. Sullivan and the decedent or any other person as joint tenants, or as a part of any joint-tenancy property, or as community property. The value of said property and interests of Hattie B. Sullivan, to wit, \$62,762.55, was not, therefore, includible in the value of the gross estate of the decedent, and the inclusion thereof in said estate is one of the errors of which petitioner complains.

(p) At the time of the making of the gift made by the decedent to his son, Floyd K. Sullivan, as aforesaid, and at the time the aforesaid agreement, deeds and assignments were executed, the decedent was between seventy-seven and seventy-eight years of age, was in good health and was not conscious or aware of any infirmity in his physical condition or that his death was imminent or impending. His death was in fact caused by and resulted from surgery performed upon the decedent on the 3rd day of January, 1944, and not from normal or natural causes; and the decedent did not at the time said gift was made or at the time said agreement or any of said deeds or assignments were executed foresee, [16] contemplate or intend that any surgical operation was to be performed upon him.

Wherefore, your petitioner prays that this Court may hear this proceeding and that it may find:

1. That no deficiency exists in the estate tax due by reason of the death of Frank K. Sullivan;

2. That no part of the value, to wit, \$25,013.80, of the undivided one-half interest of Hattie B. Sullivan in the United States Savings Bonds, Series G, and interest thereon herein referred to, was or is includible in the value of the decedent's gross estate under the provisions of Section 811 (c) or Section 811 (e) of the Internal Revenue Code or otherwise;

3. That no part of the value, to wit, \$37,748.75, of the undivided one-half interest of Hattie B. Sullivan in all property, real and personal, owned by her and decedent as tenants in common, exclusive of said bonds and interest thereon, was or is includible in the value of decedent's gross estate under the provisions of Section 811 (c) of the Internal Revenue Code;

4. That no part of the value, to wit, \$33,526.54, of the securities given to and acquired by said Floyd K. Sullivan as hereinabove stated was or is includible in the value of decedent's gross estate under the provisions of Section 811 (c) of the Internal Revenue Code, and [17]

5. For such other and further relief as the nature of the case may warrant.

/s/ PHILIP C. JONES,

/s/ ALBERT MOSHER,

Attorneys for Petitioner.

(Duly Verified.) [18]

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of August 15, 1946
Internal Revenue Agent in Charge
Los Angeles Division
LA:ET:90D:NAB

Estate of Frank K. Sullivan, deceased
Mr. Floyd K. Sullivan, Executor
327 Burlingame
West Los Angeles, California

Dear Mr. Sullivan:

You are advised that the determination of the estate tax liability of the above-named estate discloses a deficiency of \$18,963.17, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday or Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return (s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, Jr.,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

Enclosures: State, Form of Waiver.

Statement

	Liability	Assessed	Deficiency
Estate tax	\$18,963.17	\$	\$18,963.17

In making this determination of the federal estate tax liability of the above-named estate careful consideration has been given to the report of examination dated June 21, 1945, to the protest dated August 13, 1945, and to the statements made at the hearings on September 20, 1945, and March 25, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. Philip C. Jones, 417 South Hill Street, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Estate

Net estate for basic tax as disclosed by the return.....	(\$42,287.67)
Additions to value of net estate and decreases in deductions:	
Transfers during decedent's life.....	96,289.09
	<hr/>
	\$54,001.42
Reductions in value of net estate and increases in deductions:	
Stocks and bonds	\$140.20
Miscellaneous administration expenses..	64.20
	<hr/>
	204.40
Net estate for basic tax as adjusted.....	\$53,797.02
Net estate for additional tax as adjusted.....	\$93,797.02

Explanation of Adjustments

	Returned	Determined
Transfers during decedent's life....\$		\$96,289.09

Transfers of property on November 19, 1943, and November 24, 1943, of a total value of \$96,289.09 are included in the gross estate as transfers in contemplation of death under the provisions of Section 811 (c) of the Internal Revenue Code. Of the above transfers \$25,013.80 represents one-half of the value of \$50,000.00 United States Savings bonds, Series G, with interest, held in the name of the decedent and his wife as co-owners at his death, which are included in the gross estate in full under the provisions of section 811 (e) of the Internal Revenue Code.

Stocks and bonds:		
Item 1	\$2,319.00	\$2,363.00
Item 5	1,490.00	1,292.00
Item 6 (accrued interest).....	13.80
	<hr/>	<hr/>
	\$3,809.00	\$3,668.80
	3,668.80	
	<hr/>	
Difference	\$ 140.20	
Miscellaneous administration expenses.....	\$ 118.75	\$ 182.95
Difference	\$ 64.20	

Computation of Estate Tax

	Returned	Determined
Gross estate for basic tax.....	\$ 63,440.55	\$159,589.44
Deductions	105,728.22	105,792.42
Net estate for basic tax.....	(\$ 42,287.67)	\$ 53,797.02
Net estate for additional tax (\$2,287.67)	\$93,797.02	
Gross basic tax.....	\$ 575.94	
Credit for estate and inheritance tax.....		
Net basic tax.....		\$ 575.94
Total gross taxes (basic and additional)...	\$18,963.17	
(Gross basic tax.....	575.94	
Net additional tax.....		18,387.23
Total net basic and additional taxes.....		\$18,963.17
Total tax payable.....		\$18,963.17
Estate tax assessed.....		
Deficiency		\$18,963.17

Upon receipt of a waiver, or upon the expiration of 90 days from the date of this letter, if a petition is not filed with The Tax Court of the United States, \$18,502.42 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Section 81.9 of Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the credit evidence may be expected. [23]

EXHIBIT B

CONTRACT

This agreement, made and entered into this 24th day of November, 1943, by and between Frank K. Sullivan and Hattie B. Sullivan, husband and wife, both of Los Angeles County, California,

Witnesseth:

Whereas, the parties hereto have, during their married life with each other, accumulated certain real and personal properties; and,

Whereas, substantially all of said properties are now owned by them as joint tenants; and

Whereas, the parties desire to terminate all of such joint tenancies and to divide all of said real and personal property between them, to the end that each will own approximately one-half thereof as his or her separate property, free and clear of all rights and claims of the other party.

Now, therefore, it is agreed as follows:

First: That from and after this date all of the real and personal property owned by the parties hereto, whether presently held in joint tenancy or presently owned by either of the parties [24] hereto in his or her own name, shall be owned by each of the parties as follows:

An undivided one-half interest therein shall be the separate property of Frank K. Sullivan, and Hattie B. Sullivan hereby assigns and transfers to Frank K. Sullivan all of her right, title and interest in and to an undivided one-half interest in the same.

An undivided one-half interest therein shall be the separate property of Hattie B. Sullivan, and Frank K. Sullivan hereby assigns and transfers to Hattie B. Sullivan all of his right, title and interest in and to an undivided one-half interest in the same.

Second: It is the intent and purpose of the parties that this agreement cover all of their property and estate, wherever the same may be situated and whatever may be its kind or character, and more particularly, though not inclusively, the parties refer to the following:

REAL PROPERTY

Four (4) parcels of real property, all located in the County of Los Angeles and commonly known as

Parcel 1. 418 South Peck Drive, Beverly Hills, California, title to which stands in joint tenancy between the parties.

Parcel 2. 466 and 468 South Roxbury Drive, Beverly Hills, California, title to which stands in joint tenancy between the parties.

Parcel 3. 1035 and 1037 South Citrus Avenue, Los Angeles, California, title to which stands in joint tenancy between the parties, and [25]

Parcel 4. 7521 Maie Avenue, Bell, California, title to which stands in the name of Frank K. Sullivan alone.

It is further agreed that appropriate deeds or other instruments of transfer, aside from this agreement, will be executed by either or both of the par-

ties so as to vest an undivided one-half interest in each of said parcels of real property in each of the parties hereto as his or her property.

NOTES SECURED BY TRUST DEED

Five (5) promissory notes secured by trust deeds, as follows:

One for the principal sum of \$4,500.00, secured by a trust deed covering real property commonly known as 1000 Havenhurst, Los Angeles, California.

One for the principal sum of \$5,000.00, secured by a trust deed covering real property commonly known as 911 and 913 North Spaulding Avenue, Los Angeles, California.

One for the principal sum of \$3,400.00, secured by a trust deed covering real property commonly known as 1061-3 Crescent Heights Boulevard, Los Angeles, California, and

One for the principal sum of \$7,000.00, secured by a trust deed covering real property commonly known as 111 North Palm Drive, Beverly Hills, California.

Certain payments have heretofore been made on account of principal on each of said promissory notes so that the total unpaid principal sum thereof, as of this date, is approximately \$16,901.99, and appropriate written assignment will be executed by either or both of the parties hereto so that the actual [26] record title to each of said promissory notes and trust deeds will be vested, an undivided one-half interest in each of the parties hereto as his or her separate property.

United States Savings Bonds, Series "G", bearing 21½% interest and issued July 1, 1943, bearing the following Serial Numbers and in the following amounts:

Amount	Serial Number
\$ 5,000.00	236966
\$ 5,000.00	236967
\$10,000.00	314036
\$10,000.00	314037
\$10,000.00	314038
\$10,000.00	314039

Each of said United States Savings Bonds stands in the name of Frank K. Sullivan or Hattie B. Sullivan and it is not possible nor practical to change the registration of said bonds, but by the execution of this instrument, Frank K. Sullivan hereby transfers and sets over to Hattie B. Sullivan, as her separate property, an undivided one-half interest in each of said bonds; and Hattie B. Sullivan, by the execution of this instrument, hereby transfers and sets over to Frank K. Sullivan, as his separate property, an undivided one-half interest in each of said bonds; and by the execution of this instrument, the parties have, for all purposes, terminated their title in joint tenancy.

Chicago City Railway First Mortgage 5% Bonds, due February 1, 1927, having a total Par Value of \$4,000.00, [27] which bonds stand in the name of Frank K. Sullivan and Hattie B. Sullivan, as joint tenants. The parties hereto will, as soon as practical, change the registration of said bonds so that

bonds of a face value of \$2,000.00 shall be registered in the name of Frank K. Sullivan and bonds of a like amount in face value shall be registered in the name of Hattie B. Sullivan. However, by the execution of this instrument, Frank K. Sullivan does hereby transfer and set over to Hattie B. Sullivan an undivided one-half interest in all of said bonds as her separate property, and Hattie B. Sullivan does hereby transfer and set over to Frank K. Sullivan an undivided one-half interest in all of said bonds as his separate property; and by the execution of this instrument, the parties have, for all purposes, terminated their title in joint tenancy.

CORPORATE STOCKS

Item 1. 200 Shares Union Bond Fund "A", being a classification of the capital stock of Union Trusteed Funds Inc., (a Delaware Corporation) represented by Certificate UBA184, for 100 Shares and Certificate UBA185, for 100 Shares.

Item 2. 896½ Shares of the Capital Stock of Bonnie Lee Apartment Corporation, (a California corporation) represented by Certificates Nos. 250, 251, 252, 253, 254 and 294.

Item 3. St. Francis Hotel and Apartments, a corporation, represented by Certificate No. 178, for 1407 Shares. [28]

Each of the foregoing corporate stocks stands in the name of Frank K. Sullivan or Hattie B. Sullivan, or Frank K. Sullivan and Hattie B. Sullivan, as joint tenants. As soon as practical, the said shares of stock will be divided between the parties

and reissued in their respective names. By the execution of this instrument, Frank K. Sullivan hereby transfers and sets over to Hattie B. Sullivan, as her separate property, an undivided one-half interest in each of said stock and Hattie B. Sullivan hereby transfers and sets over to Frank K. Sullivan, as his separate property, an undivided one-half interest in each of said shares of stock; and by the execution of this instrument, the parties have, for all purposes, terminated their title in joint tenancy.

The consideration for this agreement is the mutual covenants and promises herein contained and each of the parties hereby agree to execute any and all instruments of transfer or conveyance which may be necessary, convenient or desirable to perfect the clear record title of each in and to his or her share of each and every item of property described or referred to herein or which belongs to the parties hereto and may not be described or specifically referred to herein.

Witness our signatures the day and year first above written.

/s/ FRANK K. SULLIVAN.

/s/ HATTIE B. SULLIVAN.

Witnesses:

.....

.....

[Endorsed]: Filed Nov. 12, 1946. [29]

State of California,
County of Los Angeles—ss.

On this 24th day of November, A.D. 1943, before me, Viola Coleman, a Notary Public in and for said County and State, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me, (or proved to me on the oath of), to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1), (2) and (3). Admits the allegations contained in paragraphs (1), (2) and (3) of the petition.

(4)(a) to (e), inclusive. Denies the allegations

of error contained in subparagraphs (a) to (e), inclusive, of paragraph (4) of the petition.

(5)(a) to (c), inclusive. Admits the allegations contained in subparagraphs (a) to (c), inclusive, of paragraph (5) of the petition.

(d) Denies the allegations contained in subparagraph (d) of paragraph (5) of the petition.

(e) Admits the matter set forth in subparagraph (e) of [30] paragraph 5 of the petition except it is denied that the sale of the decedent's coal business was made for the sum of approximately \$100,000.

(f) and (g). Denies the allegations contained in subparagraphs (f) and (g) of paragraph (5) of the petition.

(h). To the extent that the allegations contained in subparagraph (k) of paragraph (5) of the petition are consistent with the statutory notice of deficiency they are admitted, but all other allegations contained in said subparagraph are denied.

(i) and (j). Denies the allegations contained in subparagraphs (i) and (j) of paragraph (5) of the petition.

(k). To the extent that the allegations contained in subparagraph (k) of paragraph (5) of the petition are consistent with the statutory notice of deficiency they are admitted, but all other allegations contained in said subparagraph are denied.

(l) to (p), inclusive. Denies the allegations contained in subparagraphs (l) to (p), inclusive, of paragraph (5) of the petition.

(6). Denies each and every allegation contained in the [31] petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys, Bureau of
Internal Revenue.

[Endorsed]: Filed Dec. 23, 1946. [32]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to the above-entitled proceeding, by and through the undersigned, their respective counsel, that the facts involved in said proceeding are in part as follows:

1. **Petitioner** is an individual residing at 327 Burlingame Avenue, Los Angeles, California; he was formerly the executor of the Estate of Frank K. Sullivan, deceased, and is the person to whom

all communications in respect to said estate have been directed by the Treasury Department, and petitioner represents said estate in this proceeding. Said Frank K. Sullivan died on January 9, 1944. The probate of said estate has been concluded, petitioner was discharged as such executor on June 4, 1945, and all of said estate has [33] been distributed by decree of the Superior Court of the State of California in and for the County of Los Angeles. The estate tax return (Form 706) for said estate was filed with the Collector for the Sixth District of California and the applicable valuation date was the date of death of the decedent.

Pursuant to the decree of said Superior Court of the State of California in the Estate of Frank K. Sullivan, a life interest in the assets of said estate was distributed to Hattie B. Sullivan, wife of Frank K. Sullivan, and the remainder interest therein was distributed to Floyd K. Sullivan. Hattie B. Sullivan died on December 18, 1946, and all of the assets of said estate have now become and are now vested in Floyd K. Sullivan under the terms of the will of Frank K. Sullivan.

2. The Notice of Deficiency, a copy of which is attached to the petition on file in this proceeding, marked Exhibit A, was mailed to the petitioner on August 15, 1946.

3. The taxes in controversy are the estate taxes of said estate and in particular the Commissioner's determination of said taxes which, according to said Notice of Deficiency, disclosed a deficiency of \$18,-963.17, without application of the credit for state

inheritance taxes in the amount of \$460.75. The deficiency results from the [34] Commissioner's action in adding to the gross estate, as shown in the estate tax return of the decedent, property having agreed value of \$96,289.09 on January 9, 1944.

4. The total additions to the gross estate referred to in paragraph 3 above, having an agreed value on January 9, 1944, of \$96,289.09, consist of the following properties or interests in properties:

(a) $\frac{1}{2}$ interest in United States Savings Bonds, Series G, which, with accrued interest, had a value for said $\frac{1}{2}$ interest of \$25,013.80.

(b) A $\frac{1}{2}$ interest in the following described properties and interests having an aggregate value of \$35,348.75 as follows:

1. Lot 165, Tr. 3535, Beverly Hills.....	\$ 5,250.00
2. Lot 74, Tr. 3535, Beverly Hills.....	6,750.00
3. Lot 31, Nadeau Villa Tr. Bell.....	750.00
4. Lot 81, Tr. 5070, Beverly Hills.....	4,500.00
5. 200 sh. Union Trusteed Funds, Inc.....	2,363.00
6. 896 $\frac{1}{2}$ sh. Bonnie Lee Apts. Corp.....	5,379.00
7. 1,407 sh. St. Francis Hotel & Apt.....	200.00
8. \$4,000 Chicago City Ry. 1st Mtgd. Bds.....	1,292.00
9. 4,852.94 Note N. D. Roller, et ux.....	2,426.47
10. 4,367.66 Note Wm. H. Gass, et ux.....	2,183.83
11. 2,569.36 Note Ed. A. Riesenfeld.....	1,284.68
12. 1,900.00 Note Abbie C. Shanks.....	950.00
13. 2,939.54 Note A. E. Gorman, et ux.....	1,469.77
14. Furniture, fixtures and household goods.....	550.00

Total Value of Half Interest.....	\$35,348.75
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(c) The face value of a check for \$2,400.00 written December 20, 1943, by Hattie B. Sullivan, wife of decedent, [35] on a joint bank account.

(d) The market value of certain securities ag-

gregating \$33,526.54 which were the subject of a gift to Floyd K. Sullivan, son of decedent, on or about November 19, 1943, as follows:

1.	\$10,000.00 Gulf, Mobile and Ohio RR Co. bond.....	\$10,000.00
	Accrued interest	77.78
2.	2,500 shares Harris Mfg. Co. stock.....	4,687.50
3.	125 shares Pacific-American Investors pfd. stk.....	2,312.50
4.	1,150 shares Pacific-American Investors Inc. common stock	2,156.25
5.	40 units Southwestern Freight Lines stock.....	1,120.00
6.	100 shares Pacific Intermountain Express Co. pfd. stk.	1,000.00
7.	75 shs. Boston Edison Co. common stock.....	2,493.76
	Accrued dividend	75.00
8.	100 shs. First Boston Corp. common stock.....	2,512.50
9.	15 shs. International Business Machines Corp. common stock	2,572.50
10.	10 shs. W. B. Coon Co. preferred stock.....	1,050.00
11.	50 shs. Bank of America common stock.....	2,268.75
12.	100 shs. Walt Disney Productions pfd. stock.....	1,200.00

5. The facts with respect to the properties referred to in paragraph 4 and all subparagraphs of that paragraph are as follows:

(a) At the date of death of decedent and at all times prior thereto from the date of purchase, all of the United States Savings Bonds, Series G, referred to in subparagraph 4(a) were issued and held in the joint names of "Frank K. Sullivan or Hattie B. Sullivan." One-half of the [36] market value of said bonds was included in decedent's gross estate for Federal estate tax purposes by the executor. The Commissioner added to the gross estate the remaining one-half interest in said bonds, which, together with accrued interest, had an aggregate value of \$25,013.80 referred to in subparagraph 4(a), above, and shown by the Notice of Deficiency.

All of said bonds are the Series G savings bonds referred to in the agreement between the decedent and his wife dated November 24, 1943, a copy of which is attached to the petition on file, marked Exhibit B and incorporated herein by reference.

(b) A one-half interest in the respective real and personal properties listed in subparagraph 4(b) was included by the executor in the gross estate of Frank K. Sullivan for Federal estate tax purposes. The Commissioner added to the gross estate the value of an additional one-half interest in said properties having a value for said one-half interest of \$35,348.75. Said real and personal properties are the real and personal properties (exclusive of United States Savings Bonds, Series G) referred to by specific description or otherwise in the agreement between decedent and his wife dated November 24, 1943, a copy of which is attached to the petition, marked Exhibit B and made a part hereof by reference. The record of ownership of said properties [37] prior to November 24, 1943, and the deeds and assignments effecting a change in record ownership are set forth in paragraph 14 below.

(c) The amount of \$2,400.00 referred to in subparagraph 4(c) above represents the face value of a check drawn December 20, 1943, by Hattie B. Sullivan on a bank account in the joint names of "F. K. or Hattie B. Sullivan," which was, thereafter, deposited in a separate account in the name of Mrs. Hattie B. Sullivan in another bank. No part of the face amount of said check was included

in the gross estate of the decedent by the executor and the entire face amount thereof was included in the gross estate by the Commissioner in the deficiency notice.

(d) The amount of \$33,526.54 referred to in subparagraph (d) of paragraph 4 represents the agreed value of certain securities which were the subject of a gift to Floyd K. Sullivan, decedent's son, in accordance with the instructions contained in a letter dated November 19, 1943. A copy of said letter is attached hereto marked Exhibit 1-A and made a part hereof. No part of the value of said assets was included in the gross estate of decedent by executor, and the entire value thereof was included in the gross estate by the Commissioner in the deficiency notice. The record ownership of said securities prior to November 19, 1943, and [38] the dates upon which transfers were effected thereof are disclosed in the letter dated November 26, 1947, of the First California Company, successor to Nelson Douglass & Co., attached hereto marked Exhibit 2-B and incorporated herein by this reference.

6. Had Frank K. Sullivan died immediately prior to the execution of the agreement dated November 24, 1943, and the making of the gift in accordance with the letter dated November 19, 1943, all of the properties mentioned in subparagraphs (a), (b), (c) and (d) of paragraphs 4 and 5 hereof, except those standing in the name of Frank K. Sullivan alone, would have been includible in the gross estate of decedent Frank K. Sullivan under

Section 811(e)(1) of the Internal Revenue Code. Under the same circumstances, those properties standing in the name of Frank K. Sullivan alone, mentioned in said paragraphs, would have been includible in the gross estate of decedent Frank K. Sullivan under one of the following sections of the Internal Revenue Code, to wit, 811(e)(1) or 811(a).

7. Decedent and Hattie B. Sullivan were married April 6, 1892, in Minneapolis, Minnesota, and remained husband and wife until decedent's death on January 9, 1944. Hattie B. Sullivan, the surviving spouse, died December 18, 1946.

8. At the time of decedent's death and continuously [39] for about 22 years immediately prior thereto, decedent and his wife resided and were domiciled in the State of California. For many years prior to establishing their residence and domicile in California decedent and his wife resided and were domiciled in the State of Minnesota. Decedent was, and had been for a long period of time prior to moving to California, engaged in the retail coal business in Minneapolis, Minnesota, which business was solely owned by him and conducted under the trade name of Sullivan Coal Company. In 1918 decedent sold his entire business to the C. Reiss Coal Company and thereafter for all intents and purposes retired from active business except for occasionally assisting said buyer from time to time in setting up and organizing its Minneapolis office, of which decedent's business formed the nucleus.

9. The decedent and his wife moved to California and made it their permanent home and domicile in 1922.

10. Decedent received from the sale of his coal business the sum of \$100,000 which he thereafter proceeded to invest in California in apartment houses and income property and in mortgages and trust deeds with various firms located in Los Angeles before and after making California the permanent domicile of him and his wife.

11. Frank K. Sullivan, the decedent, was born April 6, 1866, and was, in November, 1943, and at the date [40] of his death January 9, 1944, 77 years of age. His wife, Hattie B. Sullivan, was born May 24, 1867, and was 76 years of age on January 9, 1944.

12. The decedent, Frank K. Sullivan, was examined by Dr. Julius Kahn of Los Angeles, on November 18, 1943, and admitted to Cedars of Lebanon Hospital for further examination by Dr. Kahn on November 21, 1943. He was discharged from the hospital on November 24, 1943. A copy of decedent's hospital chart and patient's record at Cedars of Lebanon Hospital, showing all treatments and conduct between November 7 and November 27, 1943, is attached hereto marked Exhibit 3-C and incorporated herein by this reference. On December 16, 1943, decedent was admitted to California Lutheran Hospital and operated upon on December 20, 1943, by Dr. H. G. McNeil of Los Angeles. Preoperative diagnosis for such operation was Car-

cenoma of the Pancreas. A second operation was performed January 3, 1944, by Dr. McNeil and the decedent succumbed January 9, 1944, at the California Lutheran Hospital. A copy of the decedent's hospital record and patient's chart of the California Lutheran Hospital is attached hereto marked Exhibit 4-D and incorporated herein by this reference.

13. The decedent's will was executed November 30, 1943, in the presence of Clyde C. Triplett of Los Angeles, [41] California. A copy of said will is attached hereto marked Exhibit 5-E. Mr. Triplett also advised and assisted decedent and Hattie B. Sullivan, his wife, in the preparation of the agreements referred to in subparagraphs (a), (b) and (d) of paragraph 5 above and the deeds, assignments and other instruments executed in connection therewith or pursuant thereto.

14. Prior to the transfer date, all the properties listed in paragraph 4(b), and referred to in paragraph 5(b), were held in joint tenancy by Frank K. Sullivan and Hattie B. Sullivan, except for item (3) of paragraph 4(b) which was held in the name of Frank K. Sullivan alone.

With respect to the assets transferred in accordance with paragraph 5(b) above and referred to and specifically identified in paragraph 4(b), transfers thereof were effected as follows:

Items (1), (2) and (4) of paragraph 4(b): **Frank K. Sullivan and Hattie B. Sullivan** joined as grantors to Frank K. Sullivan. Photostatic copies of the deeds, all being dated November 24, 1943, covering

the transaction are attached hereto marked **Exhibit 6-F**. These deeds were all recorded in the office of the County Recorder of Los Angeles County on December 6, 1943. Thereafter, deeds having been executed on the same day by Frank K. Sullivan and covering the same parcels of property conveying to Hattie B. Sullivan, his [42] wife, an undivided one-half interest therein, were recorded in the office of the County Recorder of Los Angeles County on December 9, 1943. Said deeds are attached hereto marked **Exhibit 7-G** and made a part hereof by this reference.

Item 3 of paragraph 4(b); a deed was executed on the 24th day of November, 1943, by Frank K. Sullivan, also known as Frank F. Sullivan, conveying to Hattie B. Sullivan, his wife, an undivided one-half interest therein. Said deed was recorded in the office of the County Recorder of Los Angeles County on December 6, 1943, and is attached hereto marked **Exhibit 8-H** and by this reference incorporated herein.

Transfers of items (9), (10), (11), (12) and (13) of paragraph 4(b), and referred to in paragraph 5(b), were effected as follows:

On the 24th day of November, 1943, Frank K. Sullivan and Hattie B. Sullivan executed assignments of deed of trust covering all of said items to Frank K. Sullivan. All of these assignments were recorded in the office of the County Recorder of Los Angeles County on December 9, 1943, and are attached hereto marked **Exhibit 9-I** and by this

reference made a part hereof. Thereafter assignments of deed of trust dated November 24, 1943, executed by Frank K. Sullivan and assigning to Hattie B. Sullivan, his wife, as her separate property, an undivided one-half interest in said items (9), (10), (11), (12) [43] and (13) of paragraph 4(b) were recorded in the office of the County Recorder of Los Angeles County on December 14, 1943, and are attached hereto marked Exhibit 10-J and by this reference incorporated herein.

No transfer of record was made of items (5) and (8) of paragraph 4(b) until subsequent to the death of Frank K. Sullivan, at which time transfers were effected in accordance with the decree of distribution in the Estate of Frank K. Sullivan and in accordance with the agreement of Frank K. Sullivan and his wife, Hattie B. Sullivan, dated November 24, 1943, which agreement is attached to the petition on file herein as Exhibit B and referred to in paragraph 5(a) and (b) hereof.

On November 24, 1943, the Bonnie Lee Apartments Corporation and the St. Francis Hotel and Apartments, a corporation, being the issuing companies of the securities referred to in items (6) and (7) of paragraph 4(b), were and had been for sometime past in the process of liquidation and no transfer of record of the securities referred to in items (6) and (7) of paragraph 4(b) was effected.

15. Attached hereto marked Exhibit 11-K is a

photostatic copy of the death certificate of Frank K. Sullivan.

Dated at Los Angeles, California, this 1st [44] day of December, 1947.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.

/s/ PHILIP C. JONES,
/s/ ALBERT MOSHER,
Counsel for Petitioner. [45]

EXHIBIT 1-A

840 So. Sherbourne Dr.
Los Angeles, California
November 19, 1943.

Nelson Douglass & Co.
510 South Spring St.,
Los Angeles, California.

Gentlemen:

This letter will be your authority to deliver to Floyd K. Sullivan, or his account, the stock certificates set out below:

These stocks are registered in the name of Frank K. Sullivan and Hattie B. Sullivan, as Joint Tenants, or in the name of Frank K. Sullivan, and are included in our account with you.

It is our intention to make a gift of these securities to Floyd K. Sullivan and you are, by this letter, instructed to deliver said certificates to him or his

account, and accept his instructions in the disposition of the proceeds in connection with any sales of them.

We are releasing any interest in and to the following stocks and you may accept this letter as your full discharge of any accounting thereof.

2500 sh. Harris Manufacturing Co. Ctf. No. 963-977; 157-161; 484-488

125 sh. Pacific American Investors Pfd. Ctf. No. P521 and P01190

1150 sh. Pacific American Investors Com. Ctf. No. C4378-4388; C01758

40 Units Southwestern Freight Lines

100 sh. Pacific Intermountain Express Co. Ctf. No. PX169

75 sh. Boston Edison Co. Common Ctf. No. 38682

100 sh. First Boston Corp. Ctf. No. B032079

15 sh. International Business Machine Ctf. No. F212591

10 sh. W. B. Coon Co. 7% Pfd. Ctf. No. P0316.

50 sh. Bank of American Ctf. No. E21078 and E70352

100 sh. Walt Disney Productions Conv. Pfd. Certificate No. 2310.

It is also our intention to give Floyd K. Sullivan \$10,000 Gulf Mobile & Ohio Temporary Bonds which we have in our own possession. He will deliver these bonds to you for his account.

Very truly yours,

/s/ FRANK K. SULLIVAN.

/s/ HATTIE B. SULLIVAN [46]

EXHIBIT 2-B

FIRST CALIFORNIA COMPANY

Investment Securities
MAdison 6-5781
510 Spring Street
Los Angeles 13, California

November 26, 1947

Mr. Philip C. Jones
417 S. Hill, Room 1075
Los Angeles 13, Calif.

Dear Mr. Jones:

In accordance with your request we have examined our records concerning the securities referred to in the letter of November 19, 1943, to us from Frank K. Sullivan & Hattie B. Sullivan. The certificates were received on November 16, 1943, and were in the names as listed:

- 25 Bank of America NT & SA—Frank K. Sullivan
- 25 Bank of America NT & SA—Frank K. & Hattie B. Sullivan JTRS
- 75 Boston Edison Co.—Frank K. & Hattie B. Sullivan JTRS
- 10 W. B. Coon Co. Pfd. W/W—Frank K. Sullivan
- 100 First Boston Corp.—Frank K. & Hattie B. Sullivan JTRS
- 2500 Harris Mfg. Co. A—Frank K. Sullivan
- 15 International Business Machine Corp.—Frank K. & Hattie B. Sullivan JTRS

- 1150 Pacific American Inv. Com—Frank K. Sullivan
- 125 Pac. American Inv. Pfd.—Frank K. Sullivan
- 100 Pacific Intermountain Express Pfd.—Frank K. Sullivan
- 40 Units S. W. Freight Lines—Frank K. & Hattie B. Sullivan.
- 100 Walt Disney Conv. Pfd.—Frank K. & Hattie B. Sullivan

In addition on December 14, 1943 we received \$10,000 Gulf Mobile & Ohio RR 3½/52 for the account of Floyd Sullivan and delivered the same bonds which were in bearer form to Floyd K. Sullivan on March 15, 1944.

The securities which we received on November 16th for the account of Floyd K. Sullivan were sent to transfer and the resulting certificates were dated as follows:

- 50 Bank of America—Floyd K. Sullivan 12/4/43
- 75 Boston Edison—Floyd K. Sullivan 12/6/43
- 10 W. B. Coon Co. Pfr. W/W—Floyd K. Sullivan 12/7/43
- 100 Walt Disney Conv. Pfd.—Floyd K. Sullivan 12/2/43
- 100 First Boston Corp—Floyd K. Sullivan 12/6/43
- 2500 Harris Mfg. Co. A—Floyd K. Sullivan 12/2/43
- 15 Int. Business Machines—Floyd K. Sullivan 12/7/43
- 65 Pacific Amer. Investors Pfd.—Floyd K. Sullivan 11/23/43

100 Pac. Intermountain Express Pfd.—Floyd K. Sullivan 12/14/43

40 Units S.W. Freight Line—Floyd K. & Hattie B. Sullivan 7/6/43 (Common) 6/1/43 (Pfd.)

These securities from transfer were delivered from the account of Floyd K. Sullivan on March 15, 1947.

In addition 500 shares Pacific American Investors Common was sold of December 7, 1943, and 650 shares of the same stock was sold on January 10, 1944. 60 Pacific American Investors Pfd. was sold on November 16, 1943, and all these sales were for the account of Floyd K. Sullivan.

We trust this is the information you need. However, if additional data is required, please let us know.

Your very truly,

FIRST CALIFORNIA
COMPANY,

/s/ J. M. SCHOEFFEL. [48]

EXHIBIT 3-C

Form 14 10M 11-42

Cedars of Lebanon Hospital

PATIENT'S RECORD

Hospital No. 96422

Room No. 418

Adm. Date: 11-21. 1943, at 4:05 p.m.

Dis. Date: 11-24-43.

Name: Sullivan, Mr. Frank K.

* * * *

Admitted by M. Bukly.

Doctor: J. Kahn, E. Shapiro.

Diagnosis (enter each and every one): Obstructive jaundice, cause not determined.

Condition on Discharge (enter for each diagnosis): Not treated.

* * * *

Record checked ✓

/s/ J. KAHN,

Attending Physician. [49]

Cedars of Lebanon Hospital

TREATMENT RECORD

96422

Name

Sullivan Mrs. Frank

Room

418

Page

I

Date

Doctor's Orders

Nurses' Notes

11/21/43

L. I. X-ray
 Phys. stool for bile
 & blood.

Give MgSO₄ in small
 units if nec to obtain
 spec.

Phosphoric acid synthesis
 & Pterides Index

Urine for alcoholism
 B load-

Serum Lipase.

Cholesterol

Cholesterol esters

Low fat. hi carbohydrate
 diet

P.O. Dr. Shapiro-Rabin

6³⁰ pm
 Amputated

11-22-43

RESUME USUAL OR ORDERED DIET BUT
 GIVE NO ENEMAS OR CATHARTICS. X-RAY DEPT.

R.B. (20)

10²⁰ am
 J. B. Bulbul

11-23-43

Barium enema in
 C.M. for Ca-

P.O. from Dr. Shapiro-Rabin

R. B. Bulbul

1⁰⁰ pm
 B. Lavender

11-23-43

X-RAY EXAMINATION HAS BEEN COMPLETED.

RESUME FURTHER ORDERS FROM THE

ATTENDING PHYSICIAN X-RAY DEPT. G.S.

11-24-43

X-RAY EXAMINATION HAS BEEN COMPLETED.

RESUME FURTHER ORDERS FROM THE

ATTENDING PHYSICIAN X-RAY DEPT. G.S. (20)

Exhibit 3-C—(Continued)

CEDARS OF LEBANON HOSPITAL

PROGRESS RECORD

Hospital No. 96422

NAME

Sullivan Mr. FrankROOM 418

DR.

J. J. G. L. E. Shy

Date

Note progress of case, complications, change in diagnosis, condition on discharge, instruction to patient, etc.

11/25/43Cholesterol low; phosphatase highIcterus index 68; Ammonia 40.Pt. sent home, to return later, for completion of workJ. Kahn.

PROGRESS RECORDS

Visiting doctors should make progress note every third day.

Exhibit 3-C—(Continued)

F.K. Sullivan

General Appearance: Rather thin, well developed; not ac. ill. Jaundiced
 Patient Age: 73
139 1/4 Ht.: 65 Pulse: 60 Temp.: 97 1/4 Bt. Pr.: 120/80

X few excoriations
 Head and Scalp ✓
 Appearance X some conjunctival injection; icteric.
 Sclera X leukocellular spacing
 Conjunctiva X not seen
 Iris ✓
 Discharge ✓ some transudate
 Anterior Sinuses 0
 Teeth ✓ many carious
 Tongue ✓
 Gums ✓
 Salivary Glands X some reduced
 Thyroid ✓
 Lungs ✓
 Pleura ✓
 Pericardium X depression of lower sternum
 Abdomen
 Contour X
 Expansion X
 Rebound X
 Liver X
 Spleen X
 Stomach X
 Intestines X
 Kidneys X
 Bladder X
 Prostate X
 Testes X
 Penile X
 Scrotum X
 Hernia X
 Hemorrhoids X
 Skin X
 Feet X
 Nails X
 Deep ✓
 Superficial ✓

Code:—0—Not Examined
 X—Pathology
 V—Normal

PRESSION:

Obstructive Jaundice
 Probable Ca of Pancreas

AN:

Julius Kahn, M.D.

JK/jf

Exhibit 3-C—(Continued)

Julius Kahn M.D.
123 North San Vicente Boulevard
Sullivan, Mr. F. K.

Edward Shapiro M.D.
Beverly Hills, California

11-7-43

URINALYSIS:—

Appearance—deep amber

Reaction—acid

Sp. Gr.—1.017

Sugar—negative

Albumin—negative

Acetone—negative

Bile—positive.

Microscopic—rare squamous
and renal epithelial cells.
Occasional calcium oxalate
crystals.

BLOOD COUNT:—

Haemoglobin—106%—17 grams

Erythrocytes—5,350,000

White blood cells—5,900

Polymorphonuclears—63%

Lymphocytes—22%

Large mononuclears

& Transitionals—11%

SEDIMENTATION TIME:—15 minutes—2 mm., 30 minutes
—7 mm., 45 minutes—105. mm., 60 minutes—13 mm. 75
minutes—14 mm., 105 minutes—16 mm.

11-18-43 COMPLAINTS: Jaundice.

Loss of weight

Anorexia

Weakness

Abdominal pain

Drowsiness

Cold Cough

Dark Urine

Light stools

Poor eyes, dim

hearing

Nocturia

Poliuria

No headaches no vertigo; no syncope; no nervousness; no paresis. Other special senses O.K. No nose and throat trouble; no chest pain; no dyspnoea; no heart consciousness: no dysuria; no fever, chills, nor sweats.

PERSONAL:—Age 77; married; one son (in Los Angeles) age 41; born in Penna.; resided in Penna., midwest, California. Diet—general—all classes of food. Led normal existence up to onset of this trouble. No alcohol to speak of. Tobacco—3 or 6 cigars daily. Lives with wife.

PAST ILLNESSES:—Typhoid—40 years ago, not especially severe, no complications. Quinsy sore throat frequently in boyhood. Sciatica—bad spell 18 years ago.

FAMILY HISTORY:— Father died—63. Malignant tumor of throat. Ill 6 months. Sarcoma.

Mother died—94. No special illness.

One brother—Died in childhood—acute infectious disease.

Two sisters—Died in childhood—acute infectious disease.

Brother died—74. Cancer.

Sister alive and well—70.

(Signed) J. KAHN.

[53]

Exhibit 3-C—(Continued)

Sullivan, Mr. F. K.

11-18-43 Patient felt quite well up to three weeks ago. Since then there were no definite complaints except as noted below:

Jaundice—yellow skin, noted last two or three days.

Amber urine—noted last three or four days.

Stools light last three or four days—light tan. Has been having daily movement part formed and part soft, since last three or four days. Movement not especially bulky. Ordinarily has one normal, formed movement daily.

Loss of weight—fifteen pounds in the past year. In the past two months eight to ten pounds. No great loss before one year. Had not eaten less to account for this loss.

Anorexia—lack of appetite only noted in last week. Previously ate everything with zest. Has been eating less in last few days.

Weakness—has been present only in the last few days and is not marked.

Drowsiness—has been present the last few days.

Nocturia—once nightly for the last year. Gets up toward morning. No dysuria.

Poliuria—urinates more frequently in last two weeks. Urinates three or four times a day; amount variable.

Cold—slight, has been present some weeks with slight cough.

Eyesight has been poor for many years. No worse lately.

Hearing somewhat diminished, worse on left side.

Abdominal pain began four or five days ago, as a mild tenderness beneath the right costal margin. After three or four days it left. It was never sharply defined.

(Signed) J. KAHN.

[54]

JAN 9 1944

CA 1323

CONTRACT FOR SERVICES AND SUMMARY OF PATIENT'S RECORD

LUTHERAN HOSPITAL SOCIETY OF SO. CALIF.

(A Non-Profit Charitable Organization)

Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

242553

No. 242 1150 Hospital No. 242553

(Print) SULLIVAN, Mr. Frank A. OR 5 NB CU Other Services P-7643 A.M. 4:10 P.M.

Street Address 110 SHEPPARD DR. City PRIV. Phone 1150 ?

Home Address H-35 City PR-5446 Type of Accom. SING. Rate per Day 12 Est. Per. Hosp. 126

Work Address 11 City 11TH. Admitting Diagnosis Dr. H.G. McNeil Date 12 No. 126 Priv. Hospital Admission

Sex M Marital Status Pd. Religion 11TH. Attending Physician Dr.

Birth 11TH. Place of Birth 11TH. Nationality 11TH. Intern 11TH.

Employed by 11TH. Street Address 11TH. City 11TH. Phone 11TH.

Relative or Friend 11TH. Relationship 11TH. Street Address 11TH. City 11TH. Phone 11TH.

To be Paid by 11TH. Relationship 11TH. Street Address 11TH. City 11TH. Phone 11TH.

Guarantor 11TH. Employed by 11TH. Street Address 11TH. City 11TH. Phone 11TH.

Bills to (Room or Address) 11TH. How Brought to the Hospital 11TH.

WORKING DIAGNOSIS

Carcinoma of breastFINAL DIAGNOSIS
(Enter Each and Every One)Carcinoma of breastCONDITION ON DISCHARGE
(Enter for Each Diagnosis)Dead

COMPLICATIONS

Obstructive jaundice

OPERATIONS

CholecystectomyCholecystoenterostomy

STANTS

Committee

Resident

(OVER)

I, the undersigned, have carefully reviewed all treatment, operative, progress and any and all other records a part of this chart; and I do hereby approve each and all of them as being, to the best of my knowledge, accurate and complete.

W.S. McNeilM.D.
Attending Physician

Exhibit 4-D—(Continued)

MS-5 5M 7-42

PERSONAL HISTORY

Lutheran Hospital Society of So. Calif.

(A Non-Profit Charitable Organization)

Operating

The California Hospital

The Santa Monica Hospital

Doctor H. G. McNeil

Hospital No. 242553

Name: Frank K. Sullivan

Working Diagnosis: Cancer of the head of the pancreas.

Chief Complaints: 1. loss of weight. 2. Jaundice.
3. Loss of appetite.

Present Illness (onset and chronogolical course):
About November 10th, 1943 first noticed jaundice unassociated with gastric distress of any kind. He went to the Cedars of Lebanon Hospital where he was under the care of J. Kahn who did a complete G. I. Study and other necessary laboratory work and discharged him as a surgical case.

Inventory of Symptoms By Systems

Head: Normal for his age.

Respiratory: Normal.

Cardio-Vascular: No history of previous trouble.

/s/ H. G. McNEIL, M.D.,

(Over)

[56]

Exhibit 4-D—(Continued)

Gastro-Intestinal: No history of any kind.

Genito-Urinary: Nocturia once or twice.

Nervous: Normal.

Skin, Bones and Joints: Normal.

Habits

(Exercise, Alcohol, Tobacco, Tea, Coffee, Drugs, etc.): No alcoholic and no tobacco.

Past History

Childhood: Normal.

Adult: No history of any illness of any kind.

Surgical: None.

Former Hospital Admissions and Diagnosis: None.

Family History

Irrelevant.

/s/ H. G. McNEIL,

Intern.

[57]

Exhibit 4-D—(Continued)

Form MS-6 10M 8-42 LP

PHYSICAL EXAMINATION

[Lutheran Hospital Society of So. Calif. heading]

Doctor: H. G. McNeil. Hospital No. 242553

Name: Frank K. Sullivan.

Address: 840 So. Sherbourn.

Summary of Physical Examination

General: Deeply jaundiced. Height: 5-8. Weight: 139. Loss: 16 lbs. Temperature: 98. Pulse: 90. Quality: Good. Respiration: 17. Character: Good. Blood Pressure: Sys: 140, Dias: 80, Pulse: P.

General Appearance: (Development, Nutrition, Apparent Age, Race, Sex, Behavior, etc.) Age 78.

Skin: Deeply jaundiced. Shows the effect of the loss of weight.

Eyes and Ears: Eyes are corrected. Hearing is normal for his age.

Nose and Lips: Normal.

Teeth, Tongue and Gums: Normal.

Tonsils and Pharynx: Normal.

Neck: (Thyroid, Lymphatic, etc.) Normal.

Thorax: Lung sounds are normal. Expansion is good.

General Inspection: Good.

Breasts: Normal.

Lungs: (Inspection, Palpation, Percussion and Auscultation) Sounds are normal. Expansion is good.

(Over)

[58]

Exhibit 4-D—(Continued)

Heart: (Inspection, Palpation, Percussion, Auscultation, and Peripheral Vessels) Slightly enlarged to the left. 4 extra systoles per minute. No murmurs.

Abdomen: (Appearance, Distention, Scars, Rigidity, Tenderness, Masses, Stomach, Liver, Gall-bladder, Spleen, Colon, Kidneys, etc.) Flat. Not sensitive. Liver slightly enlarged. There is an apparent mass just below the liver outline which is freely moveable and not painful. Kidneys are not sensitive. Cannot be palpated. Spleen is normal in size. No fluid in the abdomen.

Back (Spine, Kidneys, Tenderness, etc.) Normal.

Genitalia: Male (Penis, Scrotum, Testes, Inguinal Rings, Prostate, etc.) Normal. Prostate is normal for his age.

Rectum and Anus: Normal. No evidence of hemorrhoids.

Extremities: (Bones, Joints, Vessels, etc.) All normal.

Reflexes: Essentially normal. Pupils: Eq. and Reg: Yes. React Lt: Yes. React. Accom: Yes. Superficial: Normal. Deep Tendon: Normal. Babinski, Gordon, Oppenheim, etc.: None.

Tentative Diagnosis: Carcinoma of the pancreas.

/s/ H. G. McNEIL,

Intern.

[59]

Exhibit 4-D—(Continued)

MS-3A-5M-5-43-LP

OPERATIVE RECORD

[Lutheran Hospital Society of So. Calif. heading]

Hosp. No. 242553

Date: Dec. 20, 1943

Name: Sullivan, Mr. Frank. Room No. 247.

Doctor: H. G. McNeil.

Surgeon: Dr. H. G. McNeil.

Assistant: Dr. W. McKenna.

House Surgeon: Dr. E. Mora.

Anesthetist: Dr. S. Kreinman.

Instrument Nurse: M. Jones.

Sponge Nurse: J. Ford.

Preoperative Diagnosis: Carcinoma pancreas.

Postoperative Diagnosis: Carcinoma of the pancreas.

Operation: Cholecystostomy.

Operation Started: 10:20 a. Ended: 11:30 a.

Anesthetic Used: Ether: Started: 10:05 a. Ended: 11:05 a.

Operating Room Used: A.

Findings: Upon opening the abdomen a distended gallbladder presented and the peritoneum was deeply tinted with bile. The liver and other organs observed were also bile stained. The liver was not

Exhibit 4-D—(Continued)

greatly enlarged. There was a firm mass approximately 2x3 cm. in size in the head of the pancreas. Stomach was apparently normal. No enlarged lymphatic glands and no stones could be felt in the common duct.

What was done: Through the usual right diagonal rectus incision the abdomen was opened and the above exploration made. It was decided not to attempt at this time to anastomose the gallbladder with the stomach. Accordingly, the gallbladder was drained, tube inserted and the gallbladder wound closed with No. 1 cromatic purse string. The tube was sutured in place by a No. 2 plain catgut suture and the wound closed with No. 1 chromic in the peritoneum, muscle and fascia. Three retention sutures. Skin clips.

[Marginal note]: ether—Iodine—alcohol prep.

HGM:K Dictated 1-2-44.

Sponge count correct: /s/ M. Jones, J. Ford.

/s/ H. G. McNEIL, M.D.

Surgeon.

[60]

Exhibit 4-D—(Continued)

MS-3A-SM-11-43-LP

OPERATIVE RECORD

[Lutheran Hospital Society of So. Calif. heading]

Hosp. No. 242553

Date: Jan. 3, 1944

Name: Sullivan, Mr. Frank. Room No. 247.

Doctor: H. G. McNeil.

Surgeon: Dr. H. G. McNeil.

House Surgeon: Dr. H. Solomon.

Anesthetist: Dr. W. J. McKenna.

Instrument Nurse: E. Roberts.

Sponge Nurse: J. Ford.

Preoperative Diagnosis: C A pancreatic.

Postoperative Diagnosis: Carcinoma of pancreas.

Operation: Cholecystogastrostomy.

Operation Started: 12:36 p.m. Ended: 2:00 p.m.

Operating Room Used: A.

Anesthetic Used: Ether. Started: 12:15 p.m.

Ended 2:00 p.m.

Findings: Gallbladder was distended and a solid mass about 4x2 cm. stony hard in consistency was palpated in the region of the pancreas.

What was done: Original operative incision re-opened; suction was used to drain the distended gallbladder. The distal end of the gallbladder was anastomosed to the anterior surface of the pyloric end of the stomach. Two layers of sutures effected the anastomosis, the first layer being of gastrointestinal and the outer layer of linen. The peritoneum was closed using No. 1 chromic, the fascia with chromic No. 1 single, three retention sutures of silk.

Exhibit 4-D—(Continued)

Skin closed with clips. Chaffin suction tube placed in the gallbladder region tied through the wound by silk suture through the skin.

HS:K Dictated 1-3-44.

[Marginal note]: Ether & Tr. Menthionate prep.
Specimen to Lab. Yes [] No. [✓].

Sponge count correct: /s/ E. Roberts, J. Ford.

/s/ H. G. McNEIL, M.D.,
Surgeon.

[61]

MS-12-A 10M 1-43

PROGRESS RECORD

[Lutheran Hospital Society of So. Calif. heading]

Hospital No. 242553

Name: Sullivan, Mr. Frank. Room 247.

Dr. H. G. McNeil.

12/21/43—10:15 p.m.—Patient became irrational and jumped out of bed tearing off his dressing and pulling out his drainage tube from the abdominal wound.

The wound otherwise is essentially undisturbed and some watery sanguineous drainage.

Sterile dressings were reapplied and restraints and sedative ordered.

12/30—Patient still deeply jaundiced—but general condition is better. Wound draining bloody bile stained fluid.—McN.

1/9/44—Patient expired 2:40 a.m. 1/9/44.

F. B. Schuler.

[62]

Exhibit 4-D—(Continued)

TREATMENT RECORD

PHYSICIANS ORDERS
LUTHERAN HOSPITAL SOCIETY OF SO. CALIF.
(A Non-Profit Charitable Organization)
Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

HOSPITAL No. 242553

Sullivan, Mr. Frank ROOM 247 DR. H. H. McNeil

MEDICATION AND TREATMENT	DATE	DIET
44 ① 1,000 cc 5% Glucose in Saline this A.M. & P.M.		
② Hykinone 4 mg. Subcutaneous this noon & evening.		
③ Use Chaffin suction on Abdominal tubes P. R. N.		
Sodium Sulfadiazine D.V. 100 cc 2532 - cancer		40 cc D. 40
④ Expect stool. instill Sulfadiazine if you can get it - 2 tabs - down		
44 ① D.C. M. Sulfh. ✓		
② Give Elixir B & B. 3i ✓ P. R. N. to relieve itch.		
③ Sol. C. cream today ✓		
④ D.C. 1. V. & force fluids ✓ by mouth.		
⑤ Sulfathiazole gr. vii 33 ✓ B. i. d. 11 & 3 given		
⑥ A.B. & B. Pills 11 at bed- ✓ time tonight -		
V. O. Dr. McNeil per Sgt. West.		
17/44 8 ⁵⁵ P.M.		
Do not change dressings inserted Mr. McNeil sees pt. in A.M.		
V. O. Dr. McNeil per S. Maupin		
18 ① Select Diet - fresh legging.		
② A.B. & B. Pills 11 this P.M.		
③ Dressings to be changed as above.		
V. O. Dr. McNeil per Sgt.		

PHYSICIANS ORDERS
LUTHERAN HOSPITAL SOCIETY OF SO. CALIF
(A Non-Profit Charitable Organisation)

Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

HOSPITAL NO. 222853

Sullivan, Mr. Frank ROOM 247

DR H. G. McNeil

MEDICATION AND TREATMENT	DATE	DIET
<p>46 ^{UPPER SIDE FIRST} 7.11 500 Sulfadiazene sol 10cc i.d. at H. 20 40cc i.v. stat. 2. Levine tube 1. Codeine gr 1/2 p. r. u. For restlessness per phone Mr. H. J. Guentel per G. M. J. J.</p>		

BIDDING MAKES IT

Exhibit 4-D—(Continued)

MS-13 10M 8-43 LP

TREATMENT RECORD

PHYSICIANS ORDERS
LUTHERAN HOSPITAL SOCIETY OF SO. CALIF.
(A Non-Profit Charitable Organization)
Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

Hospital No. 2425-53

NAME Sullivan Mr. Frank

ROOM 247

DR. H. G. McNeil

DATE	MEDICATION AND TREATMENT	DATE	DIET
12/24	<p>Bunne today - ✓</p> <p>2 A.B. & C. Bul time - ✓</p> <p>37 ELA A & C 12 noon ✓</p> <p>7 A.M.</p>		✓ Spinal & Kera
12/24	<p>Sulfathiazole gr. XV Stat 7 P.M.</p> <p>then gr. 7 1/2 at 11 P.M. & 3 A.M.</p> <p>Phone order of Dr. McNeil for Left Subst P.M.</p>		
12/25	<p>① But Elax B & C to once a day at bed time only.</p> <p>② Sulfathiazole as above if Temp. goes over 100°</p> <p>③ 2 A.B. & C Pills tonight.</p> <p>Verbal Order of Dr. McNeil per Left P.</p>		
12/26	<p>Allow Patient to sit up in bed for short periods -</p> <p>V.O. Dr. McNeil per Left P.</p>		
12/28	<p>Bilron gr. V & ind. ✓</p> <p>V.O. Dr. McNeil per Left P.</p>		
12/31	<p>- urine</p> <p>Uchitin today ✓</p> <p>Vitamin K q. 1 at meal time</p> <p>V.O. Dr. McNeil per Left P.</p>		
1/4/44	<p>Specimen of Urine to Lab.</p> <p>V.O. Dr. McNeil per Left P.</p>		

Exhibit 4-D—(Continued)

TREATMENT RECORD

PHYSICIANS ORDERS
LUTHERAN HOSPITAL SOCIETY OF SO. CALIF.
(A Non-Profit Charitable Organization)

Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

HOSPITAL NO. 243583.

ME Sullivan, M. Frank ROOM 247

DR. McNeil

TE	MEDICATION AND TREATMENT	DATE	DIET
	USE OTHER SIDE FIRST		
4	① I.V. 1000 cc 5% Glucose in Saline at 8 A.M. ✓ 1-3-44		
	② S.S. Enema this P.M. ✓		
	③ No Breakfast ✓		
	④ Surgery at 12 Noon 1/3/44. V.O. Dr. McNeil per E.J.P.		
3/24	I.V. - Glucose 5% Saline 2 P.M. 10 M.M. - for pain. Water as tolerated V.O. Dr. McNeil per E.J.P.		
1/44	7 ⁴⁰ P.M. Glucose 5% & N.S. 1000 cc I.V. in A.M. (about 8) Liquids as tolerated V.O. Dr. McNeil per G. Manpin		
4/44	Sulfathiazole gr XV @ 12:30 am gr VII 55 @ 4:30 am Repeat @ 8:30 am L. Solomon. M. S. 1/8 gr. P.R.N. for Pain Sulfathiazole in case Temp. goes over 101 then as follows gr XV at once then gr VII 55 every 4 hrs. for 2 doses. Kars B.i.d. Levin Tube ✓		
4/44	Hydrioxone 4 mg. Subcutaneous Repeat in 4 hrs. ✓		

BINDING MARGIN

TREATMENT RECORD

PHYSICIANS ORDERS
LUTHERAN HOSPITAL SOCIETY OF SO. CALIF.
(A Non-Profit Charitable Organization)

Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

TR-0561 *OK*
Res-F1-2753
HOSPITAL NO. 242553

NAME *Sullivan, Mr. Frank*ROOM *247*DR. *H. B. McNeil*

DATE	MEDICATION AND TREATMENT	DATE	DIET
<i>12/14/43 - Linn Driv.</i>	<i>Elis P.C. - 37, at 9 P.M.</i>	<i>12/16/43</i>	<i>Soft diet</i>
	<i>refect if needed for sleep</i>		<i>Light diet</i>
	<i>Cof. Lixtion til. p.c.</i>		<i>with 3m -</i>
	<i>Ref. Synkayate - til. p.c.</i>		<i>of Nasal symp</i>
	<i>3m Milk of Mag 7 A.M. daily</i>		<i>with 2nd</i>
	<i>Order</i>		<i>meal.</i>
	<i>C. B. C. ✓</i>		
	<i>Urin. - ✓</i>		
	<i>Sektens Indry ✓</i>		
	<i>Bleeding time ✓</i>		
<i>12/18 -</i>	<i>Linn Driv. - ✓</i>		<i>As above</i>
	<i>Elis - P.C. at 9 P.M. ✓</i>		
	<i>Cof. Lixtion til. p.c. ✓</i>		
	<i>Ref. Synkayate - 4 daily ✓</i>		
	<i>Magnesium in A.M. ✓</i>		
	<i>Hyp. 1 C.C. intramuscular ✓</i>		
	<i>Vitamin B. Complex. Daily ✓</i>		
<i>12/20</i>	<i>Prep for abdominal operation</i>		
	<i>at 10 A.M. Monday</i>		
	<i>Refect Sektens Indry Monday A.M. ✓</i>		
	<i>Thoma. Soda - this 20 ✓</i>		
	<i>Giv. Numbatol for 1 1/2 at</i>		
	<i>8 A.M. -</i>		
	<i>Morphine 1/4 Atropine 1/100</i>		
	<i>9 A.M.</i>		
<i>12/20</i>	<i>Giv. 1 cc. Glucosyl. Sine ✓</i>		
	<i>Morphine 1/6 - 6 hour for pain</i>		
	<i>Sig. of operation</i>		

TREATMENT RECORD

PHYSICIANS ORDERS
LUTHERAN HOSPITAL SOCIETY OF SO. CALIF.
(A Non-Profit Charitable Organization)

Operating
THE CALIFORNIA HOSPITAL
THE SANTA MONICA HOSPITAL

HOSPITAL No. 242553

NAME Sullivan, Mr. Frank ROOM 247 Dr. H. L. McNeil

DATE	MEDICATION AND TREATMENT	DATE	DIET
	USE OTHER SIDE FIRST		
2/43	① 1,000 ^a 5% Glucose in Saline I.V. tonight. ✓		
	② Catheterize tonight if necessary. ✓		
	③ May be turned Phone orders of Dr. McNeil per left pocket. P.M. 12/21/		Liquid - 3 times daily Ice cream
1/43	Repeat above orders today V.O. Dr. McNeil per left P.		
1/43	Sulfathiazole gr. XV Stat Phone order Dr. McNeil per left P.		
	Repeat Sulfathiazole 2 tablets at 12 P.M. - ✓ 4 A.M. ✓ 8 A.M. ✓		
	Hypodermic 1/2 gr in needle for rashes -		
	Repeat I.V. Glucose & saline in A.M.		
12/43	No Lysinal per Dr. Schuler Restraints		
2/2	Sulfathiazole gr. 7 1/2 q. 4 hrs. after 8 P.M. No I.V. this A.M. ✓ V.O. Dr. McNeil per left P.		
	Caffeine suction attached to tube. Stat. V.O. Dr. McNeil per left P.		
2/3	Give Sulfathiazole gr. 7 1/2 at 12 noon & 4 P.M. only, then D.C. V.O. Dr. McNeil per left P.		

BLINDING MARGIN

EXHIBIT 5-E

LAST WILL AND TESTAMENT OF
FRANK K. SULLIVAN

I, Frank K. Sullivan, of Los Angeles, California, declare this to be my Last Will and Testament, and revoke all former wills, and codicils to wills.

First: I direct my Executors to pay out of my general estate all my just debts, last illness and burial expenses, and all Federal and State legacy and inheritance taxes.

Second: I declare that I am married, that my wife's name is Hattie B. Sullivan, and that we have one child, to-wit, a son, Floyd K. Sullivan, of Beverly Hills, California.

Third: I give, devise and bequeath to my said wife Hattie B. Sullivan, a life estate in all my property of every kind and nature, and wherever the same may be situated, and the remainder interest in all of my said estate I give, devise and bequeath to my son Floyd K. Sullivan.

Fourth: In the event my said wife, Hattie B. Sullivan, predeceases me, or does not survive distribution, then I give, devise and bequeath all of my said property to my son, Floyd K. Sullivan, or should my said son be not then living, I give, devise and bequeath all of my said property as follows:

One-third ($1/3$) thereof to Alice E. Sullivan, wife of my son Floyd K. Sullivan, or if she be not living, then to Sally Sullivan, daughter of my son Floyd K. Sullivan, and any other child or children of my said son living at the time of my death, in equal shares;

Exhibit 5-E—(Continued)

One-third (1/3) thereof to Sally Sullivan, daughter of my son Floyd K. Sullivan, and any other child or children of my said son living at the time of my death, share and share alike or to the survivor or survivors of them, or, in the event no child is then living, then to said Alice E. Sullivan;

One-sixth (1/6) thereof to my sister, Mrs. Mary D. Gillette of Towanda, Pennsylvania, or, if she does not survive distribution, then to my daughter-in-law Alice E. Sullivan and granddaughter Sally Sullivan and any other child or children of my said son Floyd K. Sullivan living at the time of my death, in equal shares, or to the survivor or survivors;

One-sixth (1/6) thereof to my sister-in-law, Mrs. Bell R. Sullivan of 4332 Lyndale Avenue South, Minneapolis, Minnesota, or, if she does not survive distribution, then to my daughter-in-law Alice E. Sullivan and granddaughter Sally Sullivan and any other child or children of my said son Floyd K. Sullivan living at the time of my death, in equal shares, or to the survivor or survivors. [70]

Fifth: All the rest and residue of my estate, if any, I give, devise and bequeath to my surviving issue, if any, and if none, then my heirs at law as determined by the laws of the State of California.

Sixth: I hereby nominate and appoint my son Floyd K. Sullivan as executor of this my Last Will and Testament, to serve as such without bond, provided if my said son shall decline to serve as such executor or is disqualified or incapable of serving

Exhibit 5-E—(Continued)

as such executor, then and in that event I appoint the Security-First National Bank of Los Angeles, California, a national banking association, as executor of this my Last Will and Testament.

I authorize my executor to sell, lease or mortgage the whole or any part of my estate, at either public or private sale, with or without notice, but subject to such confirmation as may be provided by law.

In Witness Whereof I have hereunto set my hand this 30th day of November, 1943.

FRANK K. SULLIVAN.

The foregoing instrument, consisting of three pages, including this one, was on the date thereof by the said Frank K. Sullivan, subscribed, published and declared to be his last will and testament, in the presence of us, who at his [71] request and in his presence, and in the presence of each other, have signed the same as witnesses thereto.

Clyde C. Triplett, residing at Los Angeles, Calif.

Israel Abraham, residing at Los Angeles, Cal.

EXHIBIT 6-F

GRANT DEED

In Consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan and Hattie B. Sullivan, his wife, do hereby grant to Frank K. Sullivan the real property in the County of Los Angeles, State of California, described as:

Lot 165 of Tract No. 3535, as per map recorded in Book 107, Pages 1 to 9 inclusive, of Maps, in the office of the County Recorder of said County.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN. [73]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires Oct. 15, 1947.

Dated November 24, 1943.

Recorded Dec. 6, 1943. In Book 20455. At Page 304 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [74]

Exhibit 6-F—(Continued)

GRANT DEED

In Consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan and Hattie B. Sullivan, his wife, do hereby grant to Frank K. Sullivan, as his separate property, the real property in the County of Los Angeles, State of California, described as follows:

Lot Seventy-four (74) of Tract No. 3535, as per map recorded in Book 107, Page 1, et seq. of Maps, in the office of the County Recorder of said County.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN. [75]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires Oct. 15, 1947.

Dated November 24, 1943.

Recorded Dec. 6, 1943, in Book 20455, at Page 298 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [76]

Exhibit 6-F—(Continued)**GRANT DEED**

In consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan and Hattie B. Sullivan, his wife, do hereby grant to Frank K. Sullivan the real property in the County of Los Angeles, State of California, described as:

Lot Eighty-one (81) of Tract Five Thousand Seventy (5070), Sheets 1 and 2, as per map recorded in Book 57, Pages 53 and 54 of Map Records of said County.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN. [77]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947.

Dated November 24, 1943.

Recorded December 6, 1943. In Book 20518. At Page 38 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [78]

EXHIBIT 7-G
GRANT DEED

In consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan does hereby grant to Hattie B. Sullivan, his wife, an undivided one-half interest in the real property in the County of Los Angeles, State of California, described as:

Lot 165 of Tract No. 3535, as per map recorded in Book 107, Pages 1 to 9 inclusive, of Maps, in the office of the County Recorder of said County.

It is the intention of the Grantor to vest title to the above described property in the Grantee as her sole and separate property free and clear from any rights in the Grantor, whether arising out of the marital status of the parties or otherwise.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN. [79]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 30446. At Page 389 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [80]

Exhibit 7-G—(Continued)

GRANT DEED

In consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan does hereby grant to Hattie B. Sullivan, his wife, an undivided one-half interest in the real property in the County of Los Angeles, State of California, described as:

Lot Seventy-four (74) of Tract No. 3535, as per map recorded in Book 107, Page 1, et seq. of Maps, in the office of the County Recorder of said County.

It is the intention of the Grantor to vest title to the above described property in the Grantee as her sole and separate property free and clear from any rights in the Grantor, whether arising out of the marital status of the parties or otherwise.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN. [81]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 20523. At Page 76 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [82]

Exhibit 7-G—(Continued)

GRANT DEED

In consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan does hereby grant to Hattie B. Sullivan, his wife, an undivided one-half interest in the real property in the County of Los Angeles, State of California, described as:

Lot Eighty-one (81) of Tract Five Thousand Seventy (5070), Sheets 1 and 2, as per map recorded in Book 57, Pages 53 and 54 of Map Records of said County.

It is the intention of the Grantor to vest title to the above described property in the Grantee as her sole and separate property free and clear from any rights in the Grantor, whether arising out of the marital status of the parties or otherwise.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN. [83]

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 20446. At Page 389 of Official Records, County of Los Angeles, State of California. Mame B. Beatty County Recorder. [84]

EXHIBIT S-H

GRANT DEED

In consideration of \$1.00, receipt of which is acknowledged, Frank K. Sullivan, also known as Frank F. Sullivan, does hereby grant to Hattie B. Sullivan, his wife, an undivided one-half interest in the real property in the County of Los Angeles, State of California, described as: that portion of Lot 31 of the Nadeau Villa Tract, in the County of Los Angeles, State of California, as per map recorded in Book 2, Page 56 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the Northeast corner of said Lot 31; thence Westerly along the Northerly line of said Lot, 134.39 feet to a point; thence Southerly parallel with the Easterly line of said lot 34.5 feet; thence Easterly parallel with the Northerly line of said Lot, 134.39 feet to a point in the Easterly line of said Lot; thence Northerly along said Easterly line, 34.5 feet to the point of beginning.

It is the intention of the Grantor to vest title to the above described property in the Grantee as her sole and separate property free and clear from any rights in the Grantor, whether arising out of the marital status of the parties or otherwise.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,
a/k/a FRANK F. SULLIVAN.

[85]

Exhibit 8-H—(Continued)

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan, also known as Frank F. Sullivan, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal) VIOLA COLEMAN,
Notary Public in and for said County and State.
My Commission expires Oct. 15, 1947.

Dated November 24, 1943.

Recorded Dec. 6, 1943. In Book 20511. At Page 100 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [86]

EXHIBIT 9-I

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Frank K. Sullivan, as his separate property, all beneficial interest under that certain Deed of Trust dated August 18th, 1943, executed by Norman D. Roller and Frieda V. Roller, husband and wife, as joint tenants, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and rec-

Exhibit 9-I—(Continued)

orded as Instrument No. . . . , on September 7, 1943, in Book 20255, Page 231, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 350, McNair Place Tract as per map recorded in Book 22, Page 40 of Maps in the office of the Recorder of said County.

Together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN.

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

Dated November 24, 1943.

Recorded Dec. 9, 1943, in Book 20523, at Page 83, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [88]

Exhibit 9-I—(Continued)

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Frank K. Sullivan as his separate property, all beneficial interest under that certain Deed of Trust dated August 18, 1943, executed by William H. Gass and Beatrice C. Gass, husband and wife, as joint tenants, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No., on September 15, 1943, in Book 20199, Page 297, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 14, Block D, Tract 5614, as per map recorded in Book 60, Pages 11 and 12 of Maps in the office of the Recorder of said County.

Together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the

Exhibit 9-I—(Continued)

persons whose names are subscribed to the within Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947.

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 20523, at Page 84 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder.

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Frank K. Sullivan, as his separate property, all beneficial interest under that certain Deed of Trust dated April 8, 1937, executed by Edwin A. Riesenfeld and Rita K. Riesenfeld, his wife, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, his wife, as joint tenants, Trustees, and recorded as Instrument No. . . . , on April 22, 1937, in Book 14906, Page 195, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 23, Block 16 of Tract No. 4579 in the City of Beverly Hills, as per map recorded in Book 48, pages 72-73 of Maps, in the office of the County Recorder of said County.

Together with the note or notes therein described

Exhibit 9-I—(Continued)

or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal) VIOLA COLEMAN,
Notary Public in and for said County and State.

My Commission expires October 15, 1947. [91]

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 20527. At Page 29 of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [92]

Exhibit 9-I—(Continued)

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Frank K. Sullivan, as his separate property, all beneficial interest under that certain Deed of Trust dated May 22nd, 1940, executed by Abbie C. Shanks, a widow, Trustor, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No. . . . , on May 27, 1940, in Book 17577, Page 9, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 37 of Tract 8109, as per map recorded in Book 182, Pages 33-35 of Maps, in the office of the County Recorder of said County.

Together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the persons whose names are subscribed to the within

Exhibit 9-I—(Continued)

Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal) VIOLA COLEMAN,
Notary Public in and for said County and State.

My Commission expires October 15, 1947. [93]

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 20471. At Page 254, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [94]

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Frank K. Sullivan, as his separate property, all beneficial interest under that certain Deed of Trust dated August 30th, 1943, executed by Anthony E. Gorman and Katherine Gorman, husband and wife, as joint tenants, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No. . . . , on September 24, 1943, in Book 20079, Page 311, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 19, Tract 1718, as per map recorded in Book 20, Page 84 of Maps, in the office of the County Recorder of said County.

Together with the note or notes therein described

Exhibit 9-I—(Continued)

or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN,

/s/ HATTIE B. SULLIVAN.

State of California,

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan and Hattie B. Sullivan, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947. [95]

Dated November 24, 1943.

Recorded Dec. 9, 1943. In Book 20527. At Page 28, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [96]

EXHIBIT 10-J

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Hattie B. Sullivan, his wife, as her separate property, an undivided one-half interest in all beneficial interest under that certain Deed of Trust dated August 18th, 1943, executed by Norman D. Roller and Frieda V. Roller, husband and wife, as joint tenants, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No. . . . , on September 7, 1943, in Book 20255, Page 231, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 350, McNair Place Tract as per map recorded in Book 22, Page 40 of Maps in the office of the Recorder of said County.

Together with an undivided one-half interest in the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan,

Exhibit 10-J—(Continued)

known to me to be the person whose name is subscribed to the within Instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947. [97]

Dated November 24, 1943.

Recorded Dec. 14, 1943. In Book 20521. At Page 128, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [98]

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Hattie B. Sullivan, his wife, as her separate property, an undivided one-half interest in all beneficial interest under that certain Deed of Trust dated August 18, 1943, executed by William H. Gass and Beatrice C. Gass, husband and wife, as joint tenants, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No., on September 15, 1943, in Book 20199, Page 297, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 14, Block D, Tract 5614, as per map recorded in Book 60, Pages 11 and 12 of Maps in the office of the Recorder of said County.

Exhibit 10-J—(Continued)

Together with an undivided one-half interest in the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal) VIOLA COLEMAN,
Notary Public in and for said County and State.

My Commission expires October 15, 1947. [99]

Dated November 24, 1943.

Recorded Dec. 14, 1943. In Book 20458. At Page 370, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [100]

Exhibit 10-J—(Continued)

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Hattie B. Sullivan, his wife, as her separate property, an undivided one-half interest in all beneficial interest under that certain Deed of Trust dated April 8, 1937, executed by Edwin A. Riesenfeld and Rita K. Riesenfeld, his wife, Trustors, to Frank K. Sullivan and Hattie B. Sullivan, his wife, as joint tenants, Trustees, and recorded as Instrument No., on April 22, 1937, in Book 14906, Page 195, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 23, Block 16 of Tract No. 4579 in the City of Beverly Hills, as per map recorded in Book 48, pages 72-73 of Maps, in the office of the County Recorder of said County.

Together with an undivided one-half interest in the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan,

Exhibit 10-J—(Continued)

known to me to be the person whose name is subscribed to the within Instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947. [101]

Dated November 24, 1943.

Recorded Dec. 14, 1943. In Book 20521. At Page 135, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [102]

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Hattie B. Sullivan, his wife, as her separate property, an undivided one-half interest in all beneficial interest under that certain Deed of Trust dated May 22nd, 1940, executed by Abbie C. Shanks, a widow, Trustor, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No. . . . , on May 27, 1940, in Book 17577, Page 9, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 37 of Tract 8109, as per map recorded in Book 182, Pages 33-35 of Maps, in the office of the County Recorder of said County.

Exhibit 10-J—(Continued)

Together with an undivided one-half interest in the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN.

State of California.

County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947. [103]

Dated November 24, 1943.

Recorded Dec. 14, 1943. In Book 20458. At Page 369, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [104]

Exhibit 10-J—(Continued)

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned hereby grants, assigns and transfers to Hattie B. Sullivan, his wife, as her separate property, an undivided one-half interest in all beneficial interest under that certain Deed of Trust dated August 30th, 1943, executed by Anthony E. Gorman and Katherine Gorman, husband and wife, as joint tenants, Trus-tors, to Frank K. Sullivan and Hattie B. Sullivan, husband and wife, as joint tenants, Trustees, and recorded as Instrument No. . . , September 24, 1943, in Book 20079, Page 311, of Official Records in the Office of the County Recorder of Los Angeles County, California, describing land therein as: Lot 19, Tract 1718, as per map recorded in Book 20, Page 84 of Maps, in the office of the County Recorder of said County.

Together with an undivided one-half interest in the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said Deed of Trust.

Dated this 24th day of November, 1943.

/s/ FRANK K. SULLIVAN.

State of California,
County of Los Angeles—ss.

On this 24th day of November, 1943, before me, Viola Coleman, a Notary Public in and for said County, personally appeared Frank K. Sullivan,

Exhibit 10-J—(Continued)

known to me to be the person whose name is subscribed to the within Instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

(Seal)

VIOLA COLEMAN,

Notary Public in and for said County and State.

My Commission expires October 15, 1947. [105]

Dated November 24, 1943.

Recorded Dec. 14, 1943. In Book 20447. At Page 322, of Official Records, County of Los Angeles, State of California. Mame B. Beatty, County Recorder. [106]

[Endorsed]: T.C.U.S. Filed Dec. 2, 1947.

[Title of Tax Court and Cause.]

10 T. C. No. 124

The Tax Court of the United States

ESTATE OF FRANK K. SULLIVAN, deceased,
by FLOYD K. SULLIVAN, executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 12476—Promulgated May 27, 1948.

1. Held on the facts that division of the joint estate of decedent and wife into tenancy in com-

mon and transfer to their son, was in contemplation of death.

2. The division of joint estate into tenancy in common held not bona fide sale for adequate and full consideration in money or money's worth, within section 811 (c), Internal Revenue Code.

3. Held, further, that the properties transferred originally belonged to the decedent and not to his wife, within section 811 (e) (1), Internal Revenue Code; also that a withdrawal of money by the wife from a joint bank account shortly before decedent's death did not remove the amount from his estate.

Philip C. Jones, Esq., and Albert Mosher, Esq., for the petitioner.

Douglas L. Barnes, Esq., for the respondent.

This proceeding involves a deficiency of \$18,-963.17 in estate tax. The issue is whether certain property, consisting of United States Savings Bonds and other securities, real estate and the amount of a check, is includible in the gross estate of the decedent. The facts set forth in a stipulation are so found, and will be included in the findings of fact made from other evidences.

FINDINGS OF FACT

The petitioner is the estate of Frank K. Sullivan, who died testate on January 9, 1944, a resident of California. His son, Floyd K. Sullivan, was executor; and was discharged as executor on June 4, 1945. The estate tax return for the estate of the

decedent, disclosing no tax liability, was filed with the collector for the sixth district of California. The decedent was born April 6, 1866, and was 77 years of age at the time of his death. He and Hattie B. Sullivan, who was born in 1867, were married in Minneapolis, Minnesota, in 1892, and remained husband and wife until the death of the decedent.

The decedent was the sole owner of a coal business in Minneapolis for many years prior to 1918, in which year he sold the business for \$100,000. He invested the proceeds in California in income-producing property, including apartment houses, mortgages and trust deeds prior to and after 1922, when he and his wife moved to California and thereafter until their respective deaths they continuously resided and were domiciled in California. During his residence in California, the decedent was not employed and did not engage in any business other than to look after his investments. [110]

In 1930 the decedent purchased a lot in Beverly Hills, California, and, after improving it with a house, gave the property to Floyd K. Sullivan, his only son, and the son's wife. In 1931 Floyd K. Sullivan became a member of a partnership to engage in the general brokerage business, without an investment. The decedent deposited securities of a value of about \$25,000 with a bank for use by the partnership as collateral in connection with sales and purchases. The partners sustained losses in the operation of the business. About 1933 Floyd K. Sullivan and his wife borrowed \$7,500 secured by

a mortgage on the property they had acquired by gift from the decedent. The money was borrowed to pay household expenses and deficits incurred in the operation of the brokerage business. The firm was dissolved in August 1934. The loss of Floyd K. Sullivan was about \$12,000, in settlement of which he and his wife conveyed to the decedent and his wife a duplex house of a value of about \$7,500, which had been inherited by Floyd's wife.

In 1943 Floyd K. Sullivan was 44 years of age, married and had one child, a daughter 13 years old. He still owned the home acquired by gift from his father, subject to a mortgage of about \$7,500, on which he had been making payments for ten years. In 1943 he was employed by Nelson Douglass & Co., a securities brokerage firm in Los Angeles. His earnings in 1940 were \$3,425; 1941, \$2,768; 1942, \$4,481 and 1943, \$5,221.

In 1943 the decedent and his wife informed their son of their desire to make a gift to him to make payments under a mortgage on his home and to make it easier for him to meet his other obligations. He suggested that they consult Clyde C. Triplett, an attorney in Los Angeles, specializing in tax matters, which they, accompanied by their son, did, on September 27, 1943, for the purpose of [111] ascertaining the rate of taxation on gifts. They informed the attorney that all of their property was owned as joint tenants and that they had in mind a gift of about \$33,000 to augment their son's income. The decedent also informed Triplett that he had made his money in the coal business in Minneapolis

and in response to a question of Triplett said that he was worth less at that time than when he came to California. Counsel advised them to prepare a list of the property they owned and select therefrom the property for gift to their son. During the meeting the decedent and Triplett discussed golf at some length, during the course of which decedent informed him that he played to improve his game.

A list of the property held by the decedent and his wife was furnished Triplett in accordance with his request. Counsel then suggested that the securities be delivered to him. Some of the securities were turned over to Triplett by the decedent and his wife about the middle of October 1943, when the decedent informed Triplett that the other documents would be delivered as soon as he could locate them, and that he and his wife had not decided upon the items of property for gift to their son.

The decedent and his wife made an appointment to consult Triplett on November 9, 1943, and during the course of the meeting on that date they informed him of the securities they had decided to give to their son. At that time they left with Triplett the remainder of their evidence of ownership of property, and it was ascertained that one parcel of real property was not held in joint tenancy. Triplett informed the decedent at the meeting that it was not a good idea for him to hold his property as a joint tenant, that their property was not and never had been community property, and that upon the death of one joint [112] tenant, the property passed to the survivor and was includible in the

gross estate of the decedent. He told them that it was advisable to terminate the joint tenancies and divide the property between them as tenants in common or divide in kind such property as could be so divided, and expressed the opinion that the transaction would be a non-taxable exchange, that the tax saving would not be very much, that it would involve additional probate expenses, and that thereafter one-half of the property would be in the wife's estate. Thereafter the decedent informed Triplett that he and his wife thought that his advice was sound and requested him to prepare the necessary legal documents to convert title to the property into tenancies in common.

Triplett requested Floyd K. Sullivan to prepare a letter addressed to Nelson Douglass & Co., directing it to transfer from the account of the decedent and his wife into the name of Floyd K. Sullivan the securities the parents had decided to give to their son, and to state therein that the securities were being transferred as a gift. Such a letter, being the date November 19, 1943, was prepared and signed by the petitioner and his wife. The twelve securities listed in the letter for transfer as a gift had a market value on January 9, 1944, of \$33,526.54. Six of the securities, market value \$12,340.63, were in the name of the decedent, and the remainder, except bearer form bonds of the Gulf, Mobile and Ohio Railway Co., having a market value on January 9, 1944, of \$10,077.78, including interest of \$77.78, and which were in the possession of the decedent and his wife, were in his and his wife's name. Forty

units of Southwestern Freight Lines stock, which were included in the transfer, were in the form of nonnegotiable escrow receipts, issued in connection with a voting trust. All the securities were received by the broker on November 16, 1943, [113] except the bearer form bonds, which it received on December 14, 1943, for the account of Floyd K. Sullivan. The stock certificates were reissued in November or December 1943 in the name of Floyd K. Sullivan, except 40 units of Southwestern Freight Lines stock, which were reissued in his and his wife's name as joint tenants on March 15, 1944, when the transfers could be made. No part of the value of the securities transferred to the son was included in the gross estate of decedent by the executor. The entire value was included in gross estate by respondent in his determination of the deficiency.

The decedent was very rugged and active, and was in good physical condition for a man of his age. He played golf with his son about every week and did not complain to him about the condition of his health prior to the middle of November 1943. He had no serious illness prior to his fatal illness. He was a heavy smoker of cigars and never spoke of his ailments, if he had any.

The decedent was examined by Dr. Julius Kahn on November 18, 1943. He informed the physician that he had felt quite well until three weeks before that time and complained about jaundice he had noticed two or three days previously, loss of 15 pounds of weight during the previous year, 8 to 10 pounds of which was during the past two months,

and an abdominal pain that began four or five days previously but left after a few days. The decedent was admitted to a hospital on November 21, 1943, for further examination and remained there for three days, when he was sent home to return later for completion of work. The diagnosis of Dr. Kahn from examinations made in the hospital was obstructive jaundice, probable cancer of the pancreas. Dr. Kahn discharged the decedent as a surgical case. The decedent's wife was not informed of the diagnosis made by Dr. Kahn. [114]

On November 24, 1943, a short time before the decedent left the hospital, his son inquired of Triplett by phone from the hospital whether he had prepared documents for the transfer of property of his parents, and upon being informed that they were ready for signature, requested that Triplett take the papers to the Bonnie Lee Apartments, which was owned by a corporation of which the decedent was president and principal stockholder (but in which the decedent did not reside), for execution. Triplett complied with the request. Among the legal documents executed and delivered at that time was a contract between the decedent and his wife.

The contract executed by the decedent and his wife on November 24, 1941, recites that substantially all of their property was held as joint tenants and that they desired to terminate such ownership and divide the property so that each would own as his or her separate property, free of claims of the other, approximately one-half thereof. The contract

then provided, with recited assignments to make it effective, that on and after the date it bore the real and personal property owned by them, whether held as joint tenants or in his or her own name, would be owned by them by undivided one-half interests as separate property. Some of the property was specifically referred to as covered by the agreement and consisted of (1) four parcels of real estate; (2) five promissory notes, secured by trust deeds; (3) \$50,000 face amount of U. S. Savings Bonds, Series "G"; (4) bonds of the Chicago City Railway of a face value \$4,000; (5) three blocks of corporate stock, including stock of the Union Trusteed Funds, Inc. The agreement also covered furniture, fixtures and household goods. [115]

Deeds and assignments were executed on the same day to convey and transfer the real property and notes. The deeds were recorded on December 6, 1943, or December 9, 1943. The agreement provided for registration of the corporate bonds and the re-issuance of the stock in the names of the respective transferors, one-half in each. On account of an oversight on the part of Floyd K. Sullivan, no transfer of record was made of Chicago City Railway bonds or stock of the Union Trusteed Funds, Inc., until after the death of the decedent when transfers were effected in accordance with the decree of distribution and the agreement of November 24, 1943, by issuing the securities to the decedent's wife, one-half as life tenant. The decedent and his wife had surrendered their stock in connection with dissolution proceedings of the other two corpora-

tions, and no transfer of record of the stock was made. Upon the liquidation of the corporations, one-half of the liquidating dividend was paid to the estate of decedent and the other half to decedent's wife, in accordance with the agreement of November 24, 1943. The division of the property on November 24, 1943, was the result of suggestions made by Triplett.

Prior to the execution of the agreement of November 24, 1943, all of the real estate, except one parcel which was held in the name of the decedent, notes, bonds, stocks and furniture and fixtures was held in joint tenancy by the decedent and his wife. The registered ownership of the Savings Bonds was not subject to transfer and at all times prior to the death of decedent was held in the joint names of decedent or his wife. After the death of the decedent the Savings Bonds were redeemed and one-half of the proceeds and accrued interest was retained by petitioner and the remainder paid to the survivor.

One-half of the value of the real estate, notes, bonds and stock and furniture, fixtures and household goods, was included in the gross estate of decedent by the executor. In his determination of the deficiency the respondent included the other half of the value of the property in gross estate, the agreed value for such interests being \$25,013.80 for the Savings Bonds and \$35,348.75 for the other assets.

After the various documents were executed on November 24, 1943, Triplett suggested to the decedent and his wife that they permit him to examine their wills under which each left his or her property.

to the other. He expressed to them the opinion that their wills should each leave a life estate in their property to the survivor with the remainder over to their son, as such a plan might avoid a subsequent probate proceeding, and tax expense. The decedent did not like the idea, saying that if his wife predeceased him, he could look after his own affairs. On that date the decedent informed Triplett that the doctors thought he had something wrong with his gall bladder but he thought they did not know "what they were talking about."

New wills were drafted by Triplett for the decedent and his wife and were executed on November 30, 1943. The will of decedent left all of his property to his wife for life, with a remainder interest to his son. In the event his wife predeceased him, all of his property was to go to his son. Provision was also made for the disposition of his property in the event both his wife and son predeceased him. The will of decedent's wife did not contain a provision to give the decedent a life estate in her property. [117]

On December 20, 1943, decedent's wife drew a check for \$2,400 on a bank account in her and decedent's joint names and thereafter deposited it in a separate account in her name in another bank. No part of the amount of the check was included in the gross estate by the executor. All of the amount of the check was included in gross estate by the respondent.

Floyd K. Sullivan did not know that his father had been discharged from the Cedars of Lebanon

Hospital with a recommendation of surgery. On about December 6, 1943, he took his father to Dr. H. G. McNeil for further examination and treatment. The physician prescribed hot packs for the abdominal region. On about December 15, 1943, the physician decided that an operation was necessary and the decedent was admitted to a hospital on December 16, 1943, for an operation for carcinoma of the pancreas. An operation performed on December 20, 1943, confirmed the preoperative diagnosis. A second operation was performed on January 3, 1944, in connection with the same ailment. Thereafter Dr. McNeil, for the first time, informed Floyd K. Sullivan and his mother that the decedent had cancer of the pancreas. The decedent died in the hospital on January 9, 1944. The death certificate gives carcinoma of the pancreas as the immediate cause of death.

Pursuant to a court decree, a life interest in the estate of the decedent was distributed to his widow and the remainder interest to his son. The widow died December 18, 1946, and all of the assets of the decedent's estate are now vested in the son under the terms of the decedent's will.

The transfers made on November 19, 1943, and November 24, 1943, were made in contemplation of death and the latter was not a bona fide sale for an adequate and full consideration in money or money's worth. [118]

OPINION

Disney, Judge: In his determination of the deficiency the respondent included the value of the property involved in the gift to the son on November 19, 1943, and in the agreement of November 24, 1943, between the decedent and his wife in decedent's gross estate as transfers made in contemplation of death. The notice of deficiency also recited that one-half of the value of the United States Saving Bonds, amount \$25,013.80, including interest, which was not included in the estate tax return by petitioner, was included in the gross estate under the provisions of section 811 (e) of the Code.

The contentions of the petitioner are, in substance, that the transfers were not made in contemplation of death; that the property transferred to the son was held as joint tenants and, accordingly, if the transfer was made in contemplation of death, only one-half of the value thereof is includible in gross estate under section 811 (c); that the remaining property was held, at death, as tenants in common, pursuant to the provisions of the agreement executed on November 24, 1943, with the result that only one-half of the value thereof is subject to tax, and that if the transfer was made in contemplation of death, it was made for an adequate and full consideration in money or money's worth. The parties have agreed upon the value of the property involved in the transfers.

The primary question is whether the transfers

were made in contemplation of death. Aside from the statutory presumption raised by section 811 (c), which petitioner asserts for specified reasons is not applicable, the petitioner had the burden of showing the respondent's action to be erroneous.

Contemplation of Death Gift to Son.

Concerning the transfers on November 19, 1943, the petitioner contends that the dominant motive was associated with life, rather than death, and, accordingly, they fall without the statute. The motive relied upon was a desire to supplement the property of the donee in order to give him, during the donor's lifetime, income to meet financial obligations.

The evidence contains no record of unusual generosity on the part of decedent towards his son, his only child, particularly in view of his financial standing. He had \$100,000 in cash when he took up a domicile in California in 1922, and his son was 23 years old. In 1930, the year of birth of decedent's granddaughter, the decedent had a house built on a lot and gave it to his son. The value of the gift is not shown. The next year the son entered the brokerage business with a partner. Such financial assistance as decedent gave his son in the new venture consisted of a loan of securities for use by the firm as collateral. Upon the dissolution of the firm in 1934, the son and his wife conveyed to his parents, in settlement of a debt of about \$12,000, a house of a value of about \$7,500, which the son's wife had inherited. The loan and its partial repay-

ment by the means taken are opposed to the idea that the decedent had a desire at that time to share his wealth with his son for purposes associated with his own life. Without more facts on the point, we can not infer that the decedent intended the difference between the value of the property conveyed and the amount of the indebtedness to him, as a gift to his son. [120]

There is no evidence of other gifts or financial assistance of any kind to the son, despite operation losses in the brokerage business, until the transfers in issue. The donee testified that his parents informed him that they desired to make the transfers to help him meet his financial obligations. Later, in September 1943, decedent's wife informed counsel being consulted concerning the matter, that the purpose of the gift was to provide their son with additional income. It does not appear that his need for financial help at that time differed substantially from prior years. In fact, his earnings in 1943 were \$740 in excess of income the previous year and almost double his earnings for 1941.

From this whole record we are constrained to believe that the decedent was inclined to deal with his son on a business basis, until shortly before his death. Certainly the conveyance to him, of the property inherited by his daughter-in-law, about 1934, when the son was rather apparently in worse financial condition than in 1943, was a cold business matter.

The amount involved here was not small. The

property had a value on January 9, 1944, of \$33,-526.54, which is about 20 per cent of decedent's gross estate as returned by petitioner and adjusted by the respondent. The transfer of such a proportion of the total wealth of the decedent, under all the circumstances here, indicates a purpose associated with death instead of life. [121]

Transfers November 24, 1943.

Petitioner contends that these transfers merely severed joint tenancies and created tenancies in common and, therefore, were not made in contemplation of death. The transaction had its inception in advice given the transferors by counsel on November 9, 1943, that it was against their interests to hold property as joint tenants, and, in effect, that if the property were held as tenants in common, there would be less value of property for inclusion in gross estate upon the death of the decedent. The action taken manifests a desire of decedent to so arrange all of his property interests as to reduce death taxes. It seems to have been the controlling motive and had a direct relation with what would happen to his property upon death. It has been held under similar circumstances that the transfers were made in contemplation of death. *First Trust & Deposit Co. v. Shaughnessy*, 134 Fed. (2d) 940; *Commonwealth Trust Co. of Pittsburgh v. Driscoll*, 50 Fed. Supp. 949, affirmed 137 Fed. (2d) 653; *Vanderlip v. Commissioner*, 155 Fed. (2d) 152, affirming 3 T. C. 358. In *Allen v. Trust Co. of Georgia*, 326 U. S. 630, the Court said, with

respect to the leading case, *United States v. Wells*, 283 U. S. 102, that "the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution."

The decedent enjoyed good health for a man of his age until the development of a cancer at a time not disclosed by the record. He started to lose weight a year before the transfers and lost from eight to ten pounds during a period of two months before November 18, 1943, on which date he consulted a physician for the first time about the condition of his health. At that time he had not felt [122] well for about three weeks and had had jaundice for two or three days. Whether the consultation occurred after or before he requested counsel to draft documents for the transfers does not appear in the evidence and we may not assume that the request preceded the visit to the doctor. In any event, the transfer papers had not been executed and the decedent signed them at the earliest possible time after his discharge, on November 24, 1943, from confinement in a hospital for three days for a more complete examination of his physical condition.

The experience the decedent was undergoing was unusual for him and constituted logical grounds for becoming apprehensive about its outcome, particularly in view of his age and past good health. The cancerous condition then existing caused his

death less than two months later. It does not appear from the evidence whether he knew he had a cancer.

Further discussion of the point would serve no useful purpose. Our conclusion is that the petitioner has failed to establish error in the action of respondent in treating the transfers, both to his son and to his wife by severance of joint tenancy, as having been made in contemplation of death.

Consideration for Transfers on November 24, 1943.

Section 811 (c) of the Code excludes from its general provisions, transfers made in "a bona fide sale for an adequate and full consideration in money or money's worth." Is the transaction here involved to be therefore excepted, though found to be in contemplation of death? We do not, in the first place, find here the characteristics of a bona fide sale in the transaction. The transfers, as already pointed out, had their inception in a desire, obviously mutual, [123] to lessen death duties while contemplating death. No bargaining at arms' length, or otherwise, appears. The petitioner concedes that the interest of the survivor was acquired by her in the first instance by a gift from the decedent. Neither does it appear that either party gave any thought to whether he or she was receiving value, adequate or inadequate, for property interests transferred. The nature of the transaction and its purpose was one that did not contemplate anything more than reciprocal transfers without regard to consideration of any kind. It was simply a family arrangement for the protection

of their estates, as they regarded them. *Phillips v. Gnichtel*, 27 Fed. (2d) 662; *Giannini v. Commissioner*, 148 Fed. (2d) 285.

Moreover, the division of the joint property into interests in common was not sale, in the ordinary sense in which we think the statute used the term. The word "sell"—in its ordinary sense means a transfer of property for a fixed price in money or its equivalent. *United States v. Benedict*, 280 Fed. 76, 80, quoted in *Hale v. Helvering*, 85 Fed. (2d) 819. No price was fixed here. It will be noted that section 811 (c) does not include "exchange"; and the most that could be said of the division of the joint estates would be that it was in a sense exchange. Nor was the transaction for the necessary consideration. Assuming that the division of interests had such reciprocity as to constitute a good consideration between the parties, we think it was not the adequate and full consideration in money or money's worth intended by the statute. A sale for full adequate consideration in money or its worth would not diminish the estate of the transferor, but leave it in effect the same as before, therefore, such a sale would be unobjectionable to the estate tax law. [124]

In *Latty v. Commissioner*, 62 Fed. (2d) 952, "in money or money's worth" is held to indicate, under section 303 of the Revenue Act of 1924, as to claims against estates, "a consideration, which at the time either augmented the estate of the decedent, granted to him some right or privilege he

did not possess before, or operated to discharge a then existing claim * * *. * * A 'sale' implies the receipt 'of money or money's worth' as the purchase price of that conveyed—the continued maintenance of the estate of the vendor at approximately its pre-existing value. A testamentary disposition is in the nature of a bounty and the antithesis of a sale * * *." In *Commissioner v. Porter*, 92 Fed. (2d) 426, construing section 303 (a) (1) of the Revenue Act of 1926 as to claims, it is held that "adequate and full consideration in money or money's worth" was "to prevent a man from diminishing his taxable estate by creating obligations not meant correspondingly to increase it but intended as gifts or a means of distributing it after his death. * * *." In *Helvering v. Robinette*, 129 Fed. (2d) 832, an exchange of promises relative to testamentary disposition was held not to be adequate and full consideration in money or money's worth within the law of gift tax. Here it seems clear that for estate tax purposes the decedent's estate was diminished, for he surrendered for the purposes of estate tax law more than he received, because, as the parties have stipulated that in the absence of the transfer here involved, the entire joint estate would be taxable under the provisions of section 811 (e), whereas, under the transfer or agreement made he received only a half interest, by tenancy in common, and therefore only that amount would be taxable estate. The situation is in some respects similar to that in *Phillips v. Gnich-*

tel, *supra*, where it was pointed out that the decedent husband had transferred to his wife, in contemplation of death as here, more than he received from [125] her and that such was not a sale for "fair consideration in money or money's worth" within sections 301 and 302 (c) of the Revenue Act of 1924. The arrangement was held "to savor more of testamentary disposition than of bargain and sale such as the statute contemplates in relieving a decedent's estate from taxation." In our view the transaction between the decedent and his wife in this matter did not comprise bona fide sale for full and adequate consideration in money or money's worth within section 811 (c), therefore may not be excepted from transfers taxable because in contemplation of death.

Interest of Decedent in Property Transferred.

Concerning the transfers to the son, petitioner argues that all of the property involved was, in accordance with local law, held as joint tenants, the securities standing in decedent's name alone being such property by reason of investment and reinvestment of like property; therefore, only one-half of the gift was made by the decedent. It is argued that the agreement of November 24, 1943, converted all of their remaining jointly held property into tenancies in common, including the real estate held in decedent's name, and as title was so held by them at decedent's death, no more than one-half of the value of the property is includible in gross estate.

The application of Federal taxing statutes to property interests is not always determined by local law, the statutory provisions governing the question here, not being dependent upon local law. *Tyler v. United States*, 281 U. S. 497; *United States v. Pelzer*, 312 U. S. 399; *Fernandez v. Weiner*, 326 U. S. 340. [126]

In *Commonwealth Trust Co. of Pittsburgh v. Driscoll*, 50 Fed. Supp. 249, affirmed per curiam, 137 Fed. (2d) 563, the decedent conveyed two parcels of real property, title to which was in his name, to himself and his wife as tenants by the entirety. Later they conveyed the properties to the wife alone. The Court held that the transfers to the wife alone were made in contemplation of death and the value thereof was includible in the decedent's estate, he having purchased the properties with his own funds.

In *Estate of William Macpherson Hornor*, 44 B.T.A. 1136, the decedent conveyed property to himself and wife as tenants by the entirety. The wife had not contributed anything towards the cost and paid nothing in connection with the conveyance to the entirety. Later they conveyed the property to themselves and another as trustees, with a right to receive the income therefrom during their joint lives and the life of the survivor and subject to a joint power of revocation and withdrawal of the trust estate during their joint lives. Later, other property was conveyed to the trust. We held that the property in trust was includible in gross estate

under section 302 (c) of the Revenue Act of 1926, as a transfer in contemplation of death and section 302 (e) on the ground that the trust was ineffective to avoid the provision thereof. On appeal, the court found it unnecessary to decide whether any transfer was made in contemplation of death and held that the transfer was within section 302 (e).

Section 811 (c) taxes at death the value at that time of the property previously transferred in contemplation, as here, of the event. *Inglehart v. Commissioner*, 77 Fed. (2d) 704, in which the Court said:

* * * For the purposes of the tax, property transferred by the decedent in contemplation of death is in the same category as it would have been if the transfer had not been made and the transferred property had continued to be owned by the decedent up to the time of his death * * *. [127]

To the same effect is *In re Kroger's Estate*, 145 Fed. (2d) 901; *Estate of Nathalie Koussennitsky*, 5 T. C. 650 (660) and *Estate of William Macpherson Horner*, *supra*. If we ignore the transfers on the two dates in November 1943, we find decedent holding at death, property in his own name and property as joint tenant with his wife.

Section 811 (e) (1) provides for inclusion in gross estate of the value of property held as joint tenants by the decedent and any other persons "except such part thereof as may be shown to have

originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; * * *."

The intent of section 811 (e) (1) is to include the full value of joint tenancy property in gross estate to the extent that it or the consideration therefor is traceable to the decedent. *Foster v. Commissioner*, 90 Fed. (2d) 486, affirmed per curiam 303 U. S. 618; *United States v. Jacobs*, 306 U. S. 363; *Estate of Joseph A. Brudermann*, 10 T. C. No. 73 (March 30, 1948). •

Aside from the concession of petitioner that the surviving tenant acquired his interest by gift from decedent, nothing herein is contrary to the view that the original source of all of the property was the proceeds of the sale, by decedent, of his wholly owned business in 1918. None of the property or consideration therefor is shown by petitioner to have been contributed by the wife. Gifts made by a decedent and subsequently contributed by the donee to the joint tenancy with the donor, do not serve to remove any of the interest taxable to the decedent. *Dimroch v. Corwin*, 306 U. S. 363. Petitioner has failed in his proof that the decedent did not supply all of the property and the consideration therefor. [128]

The parties have stipulated that if the decedent had died immediately prior to the execution of the agreement of November 24, 1943, and the making of the gift, all of the property, except that in the name

of decedent alone, would have been includible in the gross estate of decedent under section 811 (e) (1) of the Code, and that the property standing in his name alone would have been includible in his gross estate under section 811 (e) (1), or 811 (a) of the Code. The transfers did not, under the circumstances here, serve to make the situation any different from what it would have been if the decedent had died immediately before making the gift to his son and executing the agreement on November 24, 1943, with his wife. Neither did the withdrawal by decedent's wife from a joint bank account on December 20, 1943, of \$2,400, and subsequent deposit of the amount in her name in another bank, operate to avoid tax on the amount as part of the gross estate of decedent. *Estate of Harold W. Grant*, 1 T. C. 731. See *Estate of Henry Wilson*, 2 T. C. 1059. Never having contributed any of the joint property or consideration, the surviving tenant may not be treated under section 711 (e) as the owner of any interest in the property.

Accordingly, we find no error in the respondent's determination with respect to the transfers in question.

Reviewed by the Court.

Decision will be entered for the respondent.

The Tax Court of the United States,
Washington.

Docket No. 12476.

ESTATE OF FRANK K. SULLIVAN, deceased,
By FLOYD K. SULLIVAN, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated May 27, 1948, it is

Ordered and decided: That there is a deficiency of \$18,963.17 in estate tax.

(Seal) /s/ R. L. DISNEY,
Judge.

Enter: Entered May 27, 1948. [130]

In the United States Circuit Court of Appeals for
The Ninth Circuit.

Tax Court Docket No. 12476.

ESTATE OF FRANK K. SULLIVAN, Deceased,
By FLOYD K. SULLIVAN, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW.

Taxpayer, the petitioner in this cause, by Philip C. Jones and Albert Mosher, counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on May 27, 1948, 10 T. C. No. 124, determining a deficiency in the estate tax of the above decedent in the amount of \$18,936.17, and respectfully shows:

1.

The petitioner is an individual residing at 327 Burlingame Avenue, Los Angeles 24, California, and was [131] formerly the executor of the Estate of Frank K. Sullivan, Deceased. The estate tax return (Form 706) for said estate, being the return of the tax in respect of which the asserted liability arises, was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

NATURE OF CONTROVERSY

The controversy involves the proper determination of the liability of the Estate of Frank K. Sullivan, Deceased, for estate taxes.

The decedent died January 9, 1944, and was survived by Hattie B. Sullivan, his wife.

Prior to the death of the decedent he and his wife, who were domiciled in California, participated in two transactions, the tax consequences and incidents of which are here in question.

1. On November 19, 1943, decedent and his wife jointly made a gift to their son, Floyd K. Sullivan, of certain property (securities) which they at that time owned in true joint tenancy. The fair market value of the property so given by decedent and his wife was \$33,526.54 at the date of the gift. Decedent and his wife filed separate federal gift tax returns and separate California gift tax returns (each donor reporting one-half of the value of [132] said property), and paid the taxes imposed thereon as provided by law.

In his Notice of Deficiency the Commissioner of Internal Revenue determined that the entire value of the donated property, to wit, \$33,526.54, was includible in the decedent's gross estate for federal estate tax purposes as property transferred in contemplation of death within the provisions of Section 811 (c) of the Internal Revenue Code. A portion of the deficiency asserted by the Commissioner resulted from such determination.

The Tax Court found as a fact that said transfers were made in contemplation of death, and in its opinion and decision sustained the respondent's determination with respect thereto.

Petitioner contends that no part of the value of the donated property was includible in the gross estate of the decedent; that if any part of such value was so includible, only one-half thereof, to wit, \$16,763.67, constituting the value of the one-half interest transferred by the decedent himself, was so includible; that no part of the value of the interest of the decedent's wife in the donated property was includible in the decedent's gross estate; and that the determination of the Commissioner and the findings and decision of the Tax Court opposed to or inconsistent with these contentions and the portion of the deficiency [133] computed and based upon the value of the donated property improperly included by the Commissioner and the Tax Court in decedent's gross estate, were and are unsupported by and contrary to the evidence and were and are erroneous as a matter of law.

2. Subsequent to the making of the gifts hereinbefore mentioned, and on November 24, 1943, decedent and his wife entered into an agreement in writing affecting all of the property then owned and held by them and each of them. All of such property was then and had for many years been owned and held by them in true joint tenancy. By that agreement, together with certain transfers and assignments in writing executed by the respective

parties to the agreement and made for the purpose of clarifying the record title, decedent and his wife terminated the joint tenancies with respect to the property and agreed to and did become tenants in common of said property and of all property owned by each of the parties immediately prior to the execution of said agreement. Each spouse thereafter owned and held an undivided one-half interest in and to all of their property as a tenant in common with his or her spouse, until the death of the decedent occurred.

The property affected by said agreement included United States Savings Bonds of the aggregate value of \$50,027.60 (including interest), at the date of decedent's [134] death. The remainder of said property consisted of real estate and miscellaneous property of the value of \$37,748.75 at the date of decedent's death.

One-half (and no more) of the value of said bonds and one-half (and no more) of the remaining property was included in the gross estate of the decedent in the federal estate tax return filed by petitioner as executor of decedent's will.

In his Notice of Deficiency the Commissioner of Internal Revenue determined that the value of the remaining one-half of said bonds was includible in the decedent's gross estate for federal estate tax purposes as property transferred in contemplation of death within the provisions of Section 811 (c) of the Internal Revenue Code and also as jointly held property within the provisions of Section 811

(e) of the Internal Revenue Code. In the Notice of Deficiency the Commissioner determined that the remaining one-half of the value of the real and miscellaneous property was includible in decedent's gross estate for federal estate tax purposes as property transferred in contemplation of death within the provisions of Section 811 (c) of the Internal Revenue Code. A portion of the deficiency asserted by the Commissioner resulted from the aforesaid determinations.

The Tax Court found as a fact that the above-described transactions relating to the bonds and real and [135] miscellaneous property were transfers made in contemplation of death and did not constitute a bona fide sale for an adequate and full consideration in money or money's worth. In its opinion and decision, the Court sustained the respondent's determination with respect to said transactions.

Petitioner contends that the legal effect of the agreement and writings above mentioned was to terminate the joint tenancies with reference to the properties affected thereby, and to cause the decedent and his spouse to become tenants in common of said property by operation of law; that no transfer was made by the decedent or was involved in the termination of said joint tenancies or in the resultant creation of the tenancies in common; that if any transfer was made by the decedent in said transaction such transfer was made solely as a part of and in consummation of a bona fide sale for an

adequate and full consideration in money's worth; that for the foregoing reasons Sections 811 (c) and 811 (e) (1) of the Internal Revenue Code were and are inapplicable; that no part of the value of the bonds or real estate in excess of one-half of the value of said bonds, real estate and miscellaneous property was or is includible in decedent's gross estate; and that the determination of the Commissioner and the findings and decision of the Tax Court opposed to or inconsistent with the foregoing contentions and the portion of the deficiency computed and based upon the values improperly [136] included by the Commissioner and the Tax Court in decedent's gross estate were and are unsupported by and contrary to the evidence and were and are erroneous as a matter of law.

III.

Petitioner, being aggrieved by the findings of fact and conclusions of law contained in said findings and the opinion of the Court and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 22, 1948.

/s/ PHILIP C. JONES,

/s/ ALBERT MOSHER,

Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed August 2, 1948. [137]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To Charles Oliphant, Chief Counsel, Bureau of
Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner, on the 2nd day of August, 1948, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of [138] the United States heretofore rendered in the above entitled cause. A copy of the petition for review, as filed, is hereto attached and served upon you.

Dated at Los Angeles, California, this 2nd day of August, 1948.

/s/ PHILIP C. JONES,

/s/ ALBERT MOSHER,

Attorneys for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed Aug. 2, 1948. [139]

The Tax Court of the United States

Docket No. 12476

ESTATE OF FRANK K. SULLIVAN, deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Court Room No. 229,
United States Post Office and
Court House Building,
Los Angeles, California,
December 2, 1947—4:00 p.m.

(Met pursuant to notice.)

Before: Honorable Richard L. Disney, Judge.

Appearances: Philip C. Jones and Albert Mosher,
417 South Hill Street, Los Angeles 13, California,
appearing for the Petitioner. Douglas L. Barnes
(Honorable Charles Oliphant, Chief Counsel, Bu-
reau of Internal Revenue), appearing for the Re-
spondent.

PROCEEDINGS [141]

The Court: You are relying on 817 (c) and 811
(c) and (e).

Mr. Barnes: That is correct, your Honor.

The Court: Put on your evidence for the Peti-
tioner, unless you have further statement for the
Petitioner.

Mr. Jones: Mr. Sullivan.

Whereupon,

FLOYD K. SULLIVAN,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, please, Mr. Witness. The Witness: Floyd K. Sullivan.

Direct Examination.

By Mr. Jones:

Q. Mr. Sullivan, you are the son of Frank K. Sullivan? A. That is right.

Q. And of Hattie B. Sullivan?

A. That is right.

Q. Both of them are now deceased?

A. That is true.

Q. What is your business or occupation?

A. Investment securities.

Q. Was that your occupation in 1943?

A. Yes. [147]

Q. When did you enter that business?

A. 1928—early 1929.

Q. Your father was in the coal business in Minneapolis, was he, for a number of years?

A. About 45 years, retail coal business.

Q. Subsequent to the sale of that business, do you know of your own knowledge about when he and his wife moved to California?

A. Permanently?

(Testimony of Floyd K. Sullivan.)

Q. Permanently.

A. About 1921 to 1922.

Q. Had they visited California prior to that time, before they made it their permanent domicile?

A. Yes, for short periods.

Q. Subsequent to the sale of the business in Minneapolis, did he continue to work for the buyer of the business for a period of time?

A. About two years.

Q. And thereafter did he retire completely from business?

A. Yes.

Q. When he and Mrs. Sullivan moved to California, did he enter into any sort of an investment program utilizing the sums that had been accumulated during the period he was in business, or from the sale of the business? [148]

A. Yes.

Q. What did he invest in?

A. Well, mostly in so-called gold notes of apartment houses, construction loans, trust deeds.

Q. And income property, such as duplexes, did he invest in that type of property, too?

A. Yes.

Q. Did you consult with him and Mrs. Sullivan at various times with respect to his investment program? Did you represent them, in other words, in a sense, you being in the investment business?

A. Yes.

Q. How was title taken to the investment that he made in the properties which you have described?

A. Joint tenancy.

(Testimony of Floyd K. Sullivan.)

Q. And with the sale of joint tenancy property, would the proceeds generally be reinvested in joint tenancy property? A. That is right.

Q. That was their intention?

A. Consistently.

Q. In the year 1942 and 1943, were you doing fairly well in your own business, the investment securities business? A. No. [149]

Q. What was your income for the year 1942, your net income, if you know?

A. Oh, I think it was around \$4,000.00.

Q. What was your net income in the year 1943, to your best recollection?

A. About five thousand.

Q. In 1943, did your mother and father speak to you about making a gift to you? A. Yes.

Q. And what did they say to you about such a gift? A. In what respect?

Q. Did they tell you why they were making a gift to you?

A. Well, I had quite a lot of obligations and bills, and a rather sizable mortgage on a home at the time, and they said they would like to repay the cost in order to make it a little easier for me and they wanted to make a gift.

Q. Do you have any brothers or sisters?

A. No.

Q. Do you have any deceased brothers or sisters? A. One deceased brother.

Q. When did he die?

(Testimony of Floyd K. Sullivan.)

A. Well, he was about six months old when he died.

Q. So for practical purposes you have been the only child. [150] A. Yes.

Q. Subsequent to their discussing with you the desire on their part to make you a gift, what was done in connection therewith?

A. Well, I advised them, not knowing what you could and could not do as far as the tax problem was concerned, advised them to go to a tax attorney by the name of Mr. Clyde Triplett.

Q. Did they go to see Mr. Triplett?

A. Yes.

Q. Did you go with them? A. Yes.

Q. If you recall, about what time was that meeting with Mr. Triplett?

A. Well, it was about the middle of September, 1943.

Q. And at that meeting what was discussed?

A. Well, the general nature of the securities that they held and general discussion of the allowables as far as laws are concerned on gifts, so that they could determine the amount.

Q. Did they while at this meeting in September of 1943 tell Mr. Triplett that they were there for the purpose of considering the making of a gift to you and to find out the legal ramifications involved?

A. That is right. [151]

Q. And did they say that they had a desire to

(Testimony of Floyd K. Sullivan.)

give you any particular or specific type of property?

A. No. He would have preferred to have given me stocks, because he was not stock-minded, he was more trust deed or real estate-minded, would rather have kept those and given me the equities.

Q. What was thereafter done, subsequent to the conference with Mr. Triplett in which you went into the details that they requested concerning the making of a gift to you?

A. Well, I prepared a list of all their holdings and brought it in to Mr. Triplett.

Q. Was that at Mr. Triplett's request?

A. Yes.

Q. And you sat down with your father and mother, I take it, and compiled a list of everything they held at the time.

A. Yes.

Q. Incidentally, with respect to their securities investments, did you handle those exclusively for them?

A. Yes.

Q. And were you employed at that time or were you in business for yourself?

A. I was employed by Nelson Douglass & Co.

Q. Is that concern now in existence? [152]

A. No, it is not.

Q. Has it been merged with any other organization?

A. It was sold to the First California Company.

Q. Which is now doing business here in Los Angeles?

A. Yes, sir.

(Testimony of Floyd K. Sullivan.)

Q. After you prepared a list, together with your mother and father, of all their holdings, did you deliver the list to Mr. Triplett? A. Yes.

Q. What took place then?

A. Well, he suggested then that it may be a good idea for them to bring all the securities into him so that he could see them and see if they were—what form they were actually in, and then they could sit down and decide which ones would constitute the gift, so that I could—he suggested a form of a letter that I could give to Nelson Douglass & Company to instruct them on the transfers.

Q. Well then, subsequent to the time you brought in this list and Mr. Triplett's suggestion to your father and mother that they bring in all of the evidences of title and securities and stock certificates, did they select from that list of properties the properties that constituted the gift to you?

A. Yes.

Q. And thereafter, if I understand it correctly, Mr. [153] Triplett told you to prepare a letter in a certain form addressed to Nelson Douglass & Company. A. Right.

Q. What did the letter contain, if you recall, generally?

A. Instructing them to receive from the account of Frank K. and Hattie B. Sullivan as joint tenants the following securities and retransfer them into the name of Philip K. Sullivan. One of the purposes of it was to also have a record of the

(Testimony of Floyd K. Sullivan.)

selling price of them so that I would know in future capital gain and loss transactions as to the basic cost.

Q. Mr. Sullivan, I show you a letter dated November 19, 1943, or a copy rather, which counsel for the government has handed to me, and would like to have you read it and identify it, if that is the letter that you prepared at Mr. Triplett's suggestion.

A. Do you wish me to read it?

Q. Read it to yourself.

A. This is the letter they both signed, yes, sir.

Q. Then they both signed that letter. Thereafter did you deliver that letter to Nelson Douglass & Company? A. Yes.

Q. And were the securities referred to in that letter subsequently transferred to your account? Did they come into your hands? [154]

A. Yes.

Q. And would the records of Nelson Douglass & Company clearly show the manner in which those transfers were effected? A. They should.

Mr. Jones: If your Honor please, and Mr. Barnes, in going over the letter from the First California Company which is attached as an exhibit, last evening with Mr. Sullivan, he says this is obviously an error, that it was in his name alone, and so I think perhaps I had better identify that.

Mr. Barnes: Yes, let's identify that for the

(Testimony of Floyd K. Sullivan.)

record. If you wish to make a correction you will have to get some proof here.

Mr. Jones: May I have the original stipulation, your Honor, for just a moment?

By Mr. Jones:

Q. Mr. Sullivan, I am now exhibiting to you a letter dated November 26, 1947, designated 2-B attached to the stipulation which has been filed here and which is addressed to me from the First California Company, which you have already testified to as the successor company to Nelson Douglass & Company. I have previously shown you a copy of this letter and I am referring specifically now to the last item on the page which is designed 40 units S. W. Freight [155] Lines, showing title to be in Floyd K. and Hattie B. Sullivan at the date set opposite the designation of transfer, July 6, 1943, common; June 1, 1943, preferred. Is that, in your opinion, an error? A. Yes.

Q. Was that security, those units of Southwestern Freight Lines, transferred to you?

A. I think this should be Frank K. and Hattie B. Sullivan, because at the time this date mentions they only held a voting trust certificate on that item which later was eliminated and the actual certificates were then in a position to be transferred into actual names. I think it was still in the name of Frank K. and Hattie B. Sullivan at that time. because it could not be otherwise, could not transfer a receipt for a voting trust.

(Testimony of Floyd K. Sullivan.)

Q. Early in June, 1943, that was the situation with respect to the Southwestern Freight Lines units? A. Yes, that is right.

Q. Subsequent to the delivery of the letter to Nelson Douglass & Company with respect to the transfer of these securities, did you ever receive 40 units of Southwestern Freight Lines or its equivalent?

A. Yes, as and when it could be transferred into my name it was.

Q. And the reason that they could not transfer [156] reasonably soon after the delivery of the letter was because of this voting trust arrangement that you mentioned? A. That is right.

Q. After your mother and father came to California they established various bank accounts, I take it. A. Yes.

Q. Are you familiar with the manner in which they held the deposits in these bank accounts?

A. Yes. They never had anything but a joint bank account until after he died.

Q. Until after his death, and did the proceeds of the income from the joint tenancy property find its way by deposits by both your mother and father into these joint tenancy bank accounts?

A. Yes.

Mr. Barnes: If the Court please, I don't believe this witness is competent to testify to the proceeds. I think that is obviously incorrect until after we first show personal knowledge on your

(Testimony of Floyd K. Sullivan.)

part of how these proceeds were treated, Mr. Sullivan.

The Court: Don't address the witness. Address your objections to me. You have been leading this witness. Did you hear what I said about discounting leading questions or any testimony elicited by leading questions?

Mr. Jones: I don't believe I was in the court room [157] yet then.

The Court: For the information of all attorneys, I really must disregard testimony elicited by leading questions, because, of course, I can't go on what attorneys say about a matter. I have got to have testimony before me. You are injuring your case if you lead your witness. That objection is overruled, but I will take into consideration the knowledge or lack of knowledge I have as to whether this witness knows what he is talking about. If you want his testimony on the matter, which you have just gone into, to be given consideration, you had better show that he knows what he is talking about. Proceed.

By Mr. Jones:

Q. Did you assist your mother or your father in opening bank accounts from time to time?

A. Yes.

Q. Did you assist your mother and your father with respect to the investment program and the handling of income from the various assets they owned?

A. Yes.

(Testimony of Floyd K. Sullivan.)

Q. Are you personally familiar with the condition of your father's health for a period of a year or so before his death? A. Yes.

Q. What was the condition of his health on the date in [158] September when they discussed with you the making of a gift to you and you consulted Mr. Triplett?

A. Excellent, as far as I could know.

Q. What did your father die of?

A. Well, surgery.

Q. Performed by whom?

A. Dr. Harvey G. McNeil.

Q. Would you relate for the Court the circumstances surrounding that surgery. When was he taken to the hospital, if you remember?

A. I think it was in December, early December. He started to develop a bit of yellow jaundice.

Q. This was December of 1943?

A. Yes, and Dr. McNeil prescribed hot packs for a period of a week to see if that would relieve the inflammation or whatever was causing it. That failing, he decided to take him to the hospital and drain his gall bladder.

Q. Did he tell you that that was what he was going to do? A. Yes.

Q. And thereafter was your father operated on for that purpose, draining his gall bladder?

A. The first time, yes.

Q. For the purpose of the record, it is stipulated that that surgery occurred on December 20th. Sub-

(Testimony of Floyd K. Sullivan.)

sequent to [159] that surgery, did you discuss your father's condition with Dr. McNeil? A. Yes.

Q. What did Dr. McNeil tell you?

A. Well, he thought that the thing to do when he got strong enough again would be to go in and do some sort of an operation that would let the gall bladder drain into the stomach, I believe it was, other than where it usually does, in order to get rid of the bile that caused the jaundice, that he was going to try to build him up to perform that operation. The draining apparently was only a temporary relief.

Q. Thereafter did he perform a second surgical operation on your father? A. Yes.

Q. And did he tell you at that time or subsequent to it what his post operative diagnosis was? Did he tell you what he found, in other words?

A. After the second operation he did, yes.

Q. What did he tell you?

A. He said he discovered cancer of the pancreas.

Q. Had he ever mentioned to you or to your knowledge to your mother that he thought your father might have had carcinoma of the pancreas—

A. No. [160]

Q. —prior to that time? A. No.

Q. Do you know whether Dr. McNeil ever advised your father that he thought, prior to the two surgical operations, that your father had carcinoma of the pancreas?

Mr. Barnes: If the Court please, I don't be-

(Testimony of Floyd K. Sullivan.)

lieve this witness is competent to testify to conversations between his father and the doctor at which he was not present.

The Court: I would like you to read that question to me.

(The question was read.)

The Court: This merely asks him whether he knows. I will not entertain under that question an answer as to what was said. He is merely asking him if he knows.

By Mr. Jones:

Q. You can answer that question yes or no, Mr. Sullivan.

The Court: Read the question to him.

(The question was re-read.)

The Witness: No.

By Mr. Jones:

Q. Do you know a Dr. Julius Kahn?

A. Yes.

Q. Do you know whether he attended your father?

A. I think he thought there was something wrong with his intestines and gave him a G. I. at one time prior to the time he went into the hospital, then released him. [161]

Mr. Jones: For the record, it has been stipulated that Dr. Kahn examined the decedent on November 18, 1943, and had him admitted to the Cedars of Lebanon Hospital for further examination on the 21st.

(Testimony of Floyd K. Sullivan.)

The Court: I have that before me.

By Mr. Jones:

Q. Did you ever discuss your father's condition with Dr. Kahn? A. No.

Q. Did he ever discuss it, to your knowledge, with your mother or with your father?

A. Not to my knowledge.

Q. Going back for a moment, Mr. Sullivan, to the original conference and meetings with Mr. Triplett that you mentioned, if you know, will you state whether your parents told you they were going to see him just to determine what they could do by way of making a gift to you? A. Yes.

Q. And the discussion at that time only had reference to making a gift to you?

A. That is right.

The Court: That is decidedly suggestive and leading, counsel. Let him testify.

By Mr. Jones:

Q. Subsequent to the first meeting with Mr. Triplett, [162] did you ever attend any other meeting with your parents?

A. Yes, I was with them all the time, I mean every day, going to or from the office.

Q. I mean by that, was there ever any other meeting at which you were present with Triplett and your mother and father. A. Yes.

Q. Do you recall about when that meeting occurred?

A. I think that was about November 7th or 8th or 9th, along in there.

(Testimony of Floyd K. Sullivan.)

Q. Where did it take place?

A. In Mr. Triplett's office.

Q. Will you relate to the Court at that time that you were present what took place?

A. Well, as I recall, at that time we took care of the problems connected with the gift, and also Mr. Triplett questioned my dad on where he got his money and how, and made a suggestion that considering the experience that he would be well advised to terminate the joint tenancy, and explained that setup to them.

Q. Was there an occasion for any subsequent meetings at which you attended with Mr. Triplett and your mother and father?

A. Well, not very many days later he came to the apartment house where they lived with the necessary papers [163] and had them go over the papers and sign them so he could file them, and after that was done, I believe suggested that he review their old wills and I was asked to get those out or have them get them out, and I remember, recall taking them into him the next day.

Q. When you say getting their wills, what do you mean?

A. Well, to have them get their old wills out of their box and take them down to Mr. Triplett to review them. There were changes that he thought probably would be necessary to be made.

Q. Did your father ever register any complaints to you or in your presence to the condition of his

(Testimony of Floyd K. Sullivan.)

health in the year 1943 and up to, say, the middle of November?

A. No. I played golf with him every week.

Q. You did play golf with him every week. Are you familiar with the Bonnie Lee Apartments Corporation and St. Francis Apartments Corporation? This is preliminary, your Honor. A. Yes.

Q. Subsequently to the agreement dated November 24, 1943, which you have stated your father and mother entered into, did you do anything in connection with that agreement or did your parents request that you do anything in connection with it?

A. In what respect? [164]

Q. In handling of transfers of securities.

A. Well, only as an errand boy between them and Mr. Triplett getting things signed up, or information for him that he wanted.

Q. Did you deliver to Nelson Douglass & Company, the company that was your employer, any securities for transfer subsequent to November 24, 1943, that you recall? A. On the gift part?

Q. No, no. This is subsequent to the agreement between your father and mother whereby they terminated the joint tenancy.

A. Yes, I believe so.

Q. Was any transfer made of the Bonnie Lee Apartment Corporation stock? A. No.

Q. Do you know why no transfer was made?

A. Yes. It was impossible.

(Testimony of Floyd K. Sullivan.)

Q. Will you explain that?

A. Well, when—quite sometime prior to that the building had been sold and the moneys received by my father and mother, all but about, as I guess, 8 or 10 per cent of the final payment, and the stock certificates representing the ownership of the Bonnie Lee were all turned in, and all they had was receipts for them, and pending final distribution, which was held up until they knew exactly what the [165] final costs of the transfer of ownership was to be, they were not in possession of the stock certificates.

Q. Was that corporation in the process of liquidation?

A. Liquidation, that is right, sale and the same with the St. Francis.

Mr. Jones: I have discussed with counsel for the Respondent, your Honor, the question concerning the dissolution of the Bonnie Lee Apartments Corporation, and he has agreed to stipulate that the certificate of election of that corporation to dissolve was executed on the 28th day of July, 1943, and was filed with the Secretary of State of the State of California on July 30th.

The Court: 1943?

Mr. Jones: 1943.

The Court: Is it so stipulated?

Mr. Barnes: So stipulated.

Mr. Jones: It is further stipulated, your Honor, that the written consent to the winding up and dis-

(Testimony of Floyd K. Sullivan.)

solution of this corporation executed by the shareholders shows that Frank K. Sullivan and Hattie B. Sullivan held 896½ shares as joint tenants on July 17, 1943, which is the date upon which they signed the consent.

Mr. Barnes: So stipulated for Respondent, your Honor. [168]

By Mr. Jones:

Q. Are you familiar with the St. Francis Hotel Apartments Corporation? A. Yes.

Q. Was any transfer of the stock of that corporation effected, if you know?

A. The same situation as the Bonnie Lee, except that it took longer to finish it up and there was a very small amount of residue due them, but they were not in possession of the certificates there.

Q. Do you know how your mother and father held title to stock in that corporation?

A. Joint tenancy.

Q. Had they then, as in the Bonnie Lee Apartments Corporation, sometime previously surrendered their certificates? A. That is correct.

Court: It might be of some convenience to later witnesses, if you have later witnesses here, for me to state that I do not want to sit until just a very little after 5:00, so if there is another witness here that expected to go on this evening, you may as well excuse him.

Mr. Jones: I was just going to suggest I am finished except perhaps for some redirect with Mr.

(Testimony of Floyd K. Sullivan.)

Sullivan. I don't know how long you will take, Mr. Barnes. I think [167] perhaps it would be courtesy to excuse Mr. Triplett.

Mr. Barnes: Yes, I believe that will be all we can do today.

The Court: Yes, we will not reach Mr. Triplett this evening. He might as well go. Now, let me be sure I tell him when to be back here in the morning. I am a little confused. Is Mr. Sullivan the witness that you thought was not going to be here until tomorrow?

Mr. Jones: That is right.

The Court: I thought you said that he was the executor.

Mr. Jones: I thought we might have trouble reaching him because he is out of town.

The Court: Very well. Then we will be recessed until 10:00 o'clock. You may be here tomorrow at 10:00 o'clock. I don't mean that we are recessing now, but when we do recess it will be to 10:00 o'clock.

Mr. Triplett: I will be here at 10:00 o'clock.

The Court: Proceed.

Mr. Jones: Your witness, Mr. Barnes.

Cross Examination.

By Mr. Barnes:

Q. Mr. Sullivan, what was your age at the time of the transfers of these properties to you by your mother and father? [168] A. 44.

Q. And you were married at the time?

(Testimony of Floyd K. Sullivan.)

A. That is right.

Q. Did you have any children? A. Yes.

Q. How old were your children?

A. About 13, one girl.

Q. One girl age 13. You testified that you also owned a home? A. That is right.

Q. When did you acquire that home?

A. About 1933 or '34.

Q. Your earnings in the years 1942 and 1943 were between \$4,000.00 and \$5,000.00, a year, according to your testimony. What were your earnings prior to 1942 and 1943 in comparison to your 1942 and 1943 earnings?

A. Well, the amount earned was in 1940, \$3,425.00; 1941, \$2,768.00; 1942, \$4,481.00; and 1943, \$5,221.00.

Q. You were a little better off in the years 1942 and 1943 than you were in the years prior to 1940, then, is that correct, Mr. Sullivan?

A. Not much.

Q. Had your parents ever given you any substantial amount of property before the year 1943?

A. No. [169]

Q. Did you ever inquire why in the year 1943 the need was any greater as far as you were concerned than it was in earlier years?

A. Inquire?

Q. Why did the need seem greater to you in the year 1943 than it had in any prior year?

A. Well, my earnings were less and I had

(Testimony of Floyd K. Sullivan.)

about a \$7,500.00 mortgage on which I had to make payments and so on, and we had some medical, excessive medical expenses, and a girl aged 13 begins to cost money.

Q. Doesn't a girl between the ages of 1 and 13 also cost money, Mr. Sullivan?

A. I am afraid it increases.

Q. As I understand your testimony, your earnings were larger in 1943 than they had been in any preceding year to which you have testified, and that would indicate, would it not, that your financial position was somewhat better in those years than it had been in former years?

A. Yes, a little.

Q. You had the mortgage on your home at all times since the date of purchase, Mr. Sullivan, is that correct?

A. Yes.

Q. You had been paying on this mortgage in all the preceding 10 year period?

A. That is correct. [170]

Q. And your parents had never made any gifts to you in that time?

A. No.

The Court: Keep your voice up, please, Mr. Sullivan.

By Mr. Barnes:

Q. You have testified that you were generally acquainted with the nature of your parents' investments. You were aware that many of the investments were not carried as joint tenancy but were carried in the name of your father alone?

(Testimony of Floyd K. Sullivan.)

A. Yes.

Q. And that is a fact? A. Very few.

Q. Did your father continue to play golf, Mr. Sullivan, up to the month of November, 1943?

A. Yes, sir.

Q. Did he say anything to you regarding complaints as to his health?

A. Until November?

Q. Immediately preceding the month of November 1943. A. No.

Q. Did you know that he was going to see a specialist regarding an internal condition of some sort? A. Not the first time, no.

Q. Did he ever mention to you that he was going to see Dr. Julius Kahn? [171]

A. No, that was the first time.

Q. And he didn't discuss that with you at all?

A. I knew that, yes, I knew that he was going to go under observation from him.

Q. From Dr. Kahn?

Mr. Jones: I think he misunderstood your question.

Mr. Barnes: Oh, I see.

By Mr. Barnes:

Q. How was your mother's health at the same time, Mr. Sullivan? A. Excellent.

Q. Was she under any medical care?

A. No.

Q. Did you notice any jaundice, which is as I understand a yellowish condition of the skin, did

(Testimony of Floyd K. Sullivan.)

you notice that condition with respect to your father or any loss of weight?

A. In late November.

Q. You did notice that in the month of November 1943?

A. The latter part of the month as I recall, yes.

Q. Did you ever hear your father say in explanation of his loss of weight anything to the effect that he was not feeling up to par?

A. Well, it didn't seem to have any effect, particularly, on his general health, except that he just had the yellowish [172] color.

Q. But he was interested to the extent that he was going to physicians and specialists to take care of his health at that time. A. Yes.

Q. How was your father's appetite at that time? Do you have any personal knowledge of that, Mr. Sullivan? A. Yes. He was always a good eater.

Q. During the time that he was going to Dr. Kahn's office, did he continue to have a good appetite? A. As far as I know.

Q. Did your father have any loss of weight before he was attending the physicians that we have mentioned in evidence?

A. Not to my knowledge.

Q. Now, Mr. Sullivan, turning to the conference with Mr. Triplett, I believe you testified that Mr. Triplett advised your father to terminate this joint tenancy. What was the purpose of this advice, do you know?

(Testimony of Floyd K. Sullivan.)

A. Well, as I gathered it, he asked him a considerable number of questions as to when and how he earned the money that he brought out here, and told him that he would save, if anything should happen to him at sometime in the future he would save money in taxes if he terminated the joint tenancy. [173]

Q. What kind of taxes was he talking about saving, Mr. Sullivan? Estate taxes? A. Yes.

Q. And he was advised then to create tenancies in common rather than joint tenancies, in order to save estate taxes. Is that a correct statement of it?

A. That is correct.

Q. Did your father ever mention to you that he was having his will redrafted, at the time you were in Mr. Triplett's office?

A. No. That came later.

Mr. Jones: Which time, now?

By Mr. Barnes:

Q. At any time that you were in Mr. Triplett's office prior to the 24th day of November when the contract was executed in connection with the joint tenancies themselves.

A. Well, that came up at the time he came out to my family's apartment to have them sign the papers. Then he discussed that.

Q. Why did your father request that Mr. Triplett come to the family's apartment?

A. Because it was more convenient.

(Testimony of Floyd K. Sullivan.)

Q. Doesn't your father customarily go to the attorney's office in connection with these matters?

A. He did the next day. [174]

Q. Isn't it true that on the 14th day of November when these agreements were executed your father had just been released from the Cedars of Lebanon Hospital? A. No.

Mr. Jones: If you know.

The Witness: I don't think so.

By Mr. Barnes:

Q. You knew that he was in the Cedars of Lebanon Hospital, however?

A. At one time, yes.

Q. And that that was immediately preceding the date when Mr. Triplett called at your father's apartment with the contract dated the 24th day of November, 1943, for signature by your father and your mother? A. Yes.

Q. Do you know the contents of your father's will, Mr. Sullivan?

Mr. Jones: Which one, now?

Mr. Barnes: I am speaking now of the will which was executed and administered as part of the estate of Frank Sullivan, deceased.

Mr. Jones: The probated will?

Mr. Barnes: Yes.

The Witness: Yes, I think I have read that.

By Mr. Barnes:

Q. Did you also know the substance of your prior wills which your father had prepared?

(Testimony of Floyd K. Sullivan.)

A. I believe so, yes.

Q. Was there any material change between the early will and the later will insofar as you were concerned? A. No.

Q. You were the party to whom your father intended to leave most of his estate, is that correct?

A. Yes.

The Court: It is now after 5:00 o'clock, gentlemen. I think we will recess. We will be recessed until 10:00 o'clock tomorrow morning.

(Whereupon, at 5:10 p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, December 3, 1947.)

December 3, 1947

The Clerk: Docket No. 12476, Estate of Frank K. Sullivan, deceased.

The Court: Proceed.

Whereupon,

FLOYD K. SULLIVAN,

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Continued)

By Mr. Barnes:

Q. Mr. Sullivan, I believe you testified that you were familiar with the letter identified in the rec-

(Testimony of Floyd K. Sullivan.)

ord as Exhibit 1-A, which is a letter addressed to Nelson Douglass & Co., by Frank K. Sullivan and Hattie B. Sullivan, dated November 19, 1943. Who prepared the letter to which we have just referred?

A. I did.

Q. You wrote the letter yourself and had prepared it in your office at the Nelson Douglass & Co. at that time, is that correct? A. Yes.

Q. Where did you have the letter signed by your parents, Mr. Sullivan? Where did you take the letter for signature?

A. I don't remember whether they came down to the office [180] or I got it from them.

Q. When you prepared this letter, Mr. Sullivan, did you have it dated at the time it was written in your office?

A. I can't recall that, either.

Q. All you know is you prepared a letter which we have in evidence here and it was signed by Frank K. Sullivan and Hattie B. Sullivan at some time thereafter? A. That is correct.

Q. Now, you are aware that your father was in the Cedars of Lebanon Hospital from the 21st day of November, 1943, until the 24th of November, 1943. That is a period of four days, is it not, Mr. Sullivan? A. That is right.

Q. Did you visit your father at the Cedars of Lebanon Hospital while he was there? A. No.

Q. Did your mother visit your father while he was in the Cedars of Lebanon Hospital?

A. I think she did.

(Testimony of Floyd K. Sullivan.)

Q. You spoke to your mother or father during that time that your father was in the hospital?

A. Yes.

Q. Did you have any discussion with respect to the findings of the doctor or the complaints which your father was making, which required his treatment out there at the [181] hospital at that time?

A. No. It was just a routine check up, so far as I know.

Q. Had your father ever had a routine check up at the Cedars of Lebanon Hospital at a previous time? A. No.

Q. Had he ever had a routine check up at any hospital previously? A. Not that I know of.

Q. Did you know at the time your father was discharged from the Cedars of Lebanon Hospital he was discharged with a recommendation of surgery? A. No.

Q. What arrangements did your father make with respect to admission to the California Lutheran Hospital? Did you participate at all in the arrangements made for his operation? A. Yes.

Q. I understand your physician at that time was Dr. McNeil, at the California Lutheran Hospital.

A. Yes.

Q. Had Dr. McNeil attended your father prior to his admission to the California Lutheran Hospital? A. In prior years, you mean?

Q. Yes. A. No. [182]

Q. When did your father first see Dr. McNeil? I am speaking with respect to the period between

(Testimony of Floyd K. Sullivan.)

the time he left the Cedars of Lebanon Hospital November 24, 1943, and the date of his admission to the California Lutheran Hospital on December 16, 1943. We have there a period of somewhat less than a month. In that period of time when did he first call on Dr. McNeil?

A. I think it was about 10 days before or thereabouts, from a week to 10 days before he was admitted to the hospital.

Q. Did your father tell you that he was going to the hospital to have surgery performed?

A. The day he went, yes—the day before he went, yes.

Q. At no previous time did he indicate to you he had been discharged from the Cedars of Lebanon Hospital with recommendation of surgery?

A. No.

Q. Don't you think it is a little unusual that a man 78 years old would have so little information passed to his family at a time of that sort?

Mr. Jones: I object, your Honor; argumentative.

The Court: Objection sustained.

By Mr. Barnes:

Q. Was your mother ever informed of the diagnosis made by the Cedars of Lebanon Hospital or Dr. Julius Kahn? A. No. [183]

Q. Was your mother ever informed that your father was going to the California Lutheran Hospital for surgery? A. Yes.

Q. When did she speak to you about that fact?

(Testimony of Floyd K. Sullivan.)

A. Well, the day or two days before he actually went in. We went up to Dr. McNeil's office and discussed it, and he decided that was what he should do.

Q. I would like to clear up just for a moment, Mr. Sullivan, the question which was raised with respect to an item appearing on the document identified as Exhibit 2-B on the stipulation, which is a letter dated November 26, 1947.

The Court: Do you have that stipulation, Mr. Clerk?

The Clerk: Yes.

By Mr. Barnes:

Q. With respect to certain securities which were originally transferred to Nelson Douglass & Co., I believe—

Mr. Jones: I don't believe that is correct, your Honor. They were delivered to Nelson Douglass for transfer.

Mr. Barnes: I will let the record speak for itself. I think it is in evidence.

By Mr. Barnes:

Q. The particular item I have in mind is your explanation with respect to 40 units of Southwestern Freight Lines, which you mentioned at the last session of the court, appearing on the bottom line of the first page of that letter. [184]

Now, I notice, Mr. Sullivan, that it is stated by the First California Company that on November 16, 1943, they received certain securities for the account of Floyd K. Sullivan, which were on that

(Testimony of Floyd K. Sullivan.)

date apparently sent to transfer. What do they mean by "sent to transfer"?

A. Well, I imagine they mean that these securities that were in joint tenancy they owned and were giving me were sent on November 16th to transfer into my name by myself.

Q. To whom did they send them, to another branch of the concern there?

A. No. Each corporation has its own transfer agent. It might be New York, or Chicago.

Q. At any rate, they were sent through for processing in your understanding of the business, you being in this business, you would know the manner in which these things are handled. A. Yes.

Q. They were simply sent to you for processing?

A. Yes.

Q. Now, it is stated on the bottom line here that the 40 units of Southwestern Freight Lines certificates were dated on July 6, 1943 and June 1, 1944, in the name of yourself and your mother.

Mr. Jones: Excuse me, Mr. Barnes. It is June 1, 1943. [185]

Mr. Barnes: Excuse me. I am corrected; June 1, 1943.

By Mr. Barnes:

Q. That is the thing I am concerned with here. What was your explanation of that item yesterday? I don't believe I quite understood that, Mr. Sullivan.

A. Well, as I understood it, at that time the voting stock of the Southwestern Freight Lines was

(Testimony of Floyd K. Sullivan.)

held in the voting trust. There had, up to that time, never been any actual certificates issued to the stockholders in their name. All we had was a receipt, numbered receipt showing the deposit and the ownership of X number of shares. Those receipts were non-negotiable. I think that that is an error, because I never held anything in joint ownership with my mother or anybody else.

Q. Well now, it is obviously an incorrect statement there to say those securities were issued after being received on November 16, 1943, that they were sent to transfer and the resulting securities were issued at a date earlier than November 16, 1943, is it not? Would it be possible that date should be 1944, at which time you and your mother were— may I strike that, and say in 1944 you were the executor of your father's estate, is that correct?

A. Yes.

Q. Your mother was the live tenant with respect to the [186] property passing under your father's will, is that correct? A. Yes.

Q. Were any securities in 1944 issued in your name and your mother's name for any reason?

A. There might be one. What about that union bond—

Mr. Jones: If the Court please, Mr. Barnes, I will stipulate that all the securities that were returned in Mr. Sullivan's estate were subsequently transferred by the various issuing companies and new certificates were issued in the names of Hattie B. Sullivan, as a live tenant, under that estate, and Floyd Sullivan as a remainder interest.

(Testimony of Floyd K. Sullivan.)

Mr. Barnes: I would like to straighten this out for the record. It is obvious to me, Mr. Jones, you can't receive a certificate on November 16th of one year and have it issued in a new name on a preceding date.

Mr. Jones: I agree with you, and Mr. Sullivan testified yesterday that he had at no time ever held in joint tenancy with his mother. It obviously was an error he received the 40 units of the Southwestern Freight Lines or its equivalent.

By Mr. Barnes:

Q. You don't know, of your own knowledge, what the facts are with respect to that, do you, Mr. Sullivan?

A. I would want to check it up with this company, which I could do very easily. [187]

Q. We will have to let the record stand the way it is, then.

Mr. Jones: If you would like—

The Court: Is it possible for some reason the stock certificate—it was stock, wasn't it?

Mr. Barnes: Yes.

Mr. Jones: Units of both common and preferred.

The Court: It speaks of units.

Mr. Jones: Yes.

The Court: Looking at it as a stock certificate, is it possible there was some reason the certificates were dated back on these 40 units? As I say, it would be ordinarily unthinkable that having been sent for transfer on November 16th of a certain

(Testimony of Floyd K. Sullivan.)

year, 1943, the resulting certificate, which is what they call it, was dated June 1, 1943, unless there was some reason—

Mr. Jones: For pre-dating?

The Court: —for dating a certificate back.

The Witness: That is something we can find out.

Mr. Jones: That is something I am not conversant with. Perhaps when we are through with Mr. Sullivan he could be excused to go down to the First California Company and check on the matters. It is only a few blocks down.

The Court: We will pass it for the present. For the present it would make a better record if you could explain [188] it. Proceed.

Mr. Barnes: I have no further questions.

Mr. Jones: Mr. Barnes, I think perhaps we should have entered into the record the stipulation that we agreed upon prior to your continuing the examination of Mr. Sullivan, and it pertains to the documents attached to the stipulation, executed by Frank K. Sullivan and Hattie B. Sullivan individually or jointly.

The stipulation is to the effect that those documents which are copies here, the originals of which were actually signed by the parties whose signatures they purport to bear.

The Court: Is it so stipulated?

Mr. Barnes: It is so stipulated that the signatures of the parties appearing on these documents are the signatures of the parties themselves.

The Court: Is there any further examination of this witness?

(Testimony of Floyd K. Sullivan.)

Mr. Jones: I have some redirect, your Honor.

The Court: Proceed.

Redirect Examination

By Mr. Jones:

Q. Mr. Sullivan, Mr. Barnes asked you about the letter dated November 19, 1943, which is the letter to the Nelson Douglass & Company, marked Exhibit 1-A in the stipulation. With respect to its execution on the date it bears, do you [189] know whether that letter was dated at the time your mother and father signed it or prior to the time they signed it or subsequent to the time they signed it?

A. I believe that I wrote the letter and had them sign it simultaneously, or the next day. Therefore, I would have dated it approximately the same day as they signed it.

Q. Thank you. There has been some evidence with respect to conversations between you and Dr. McNeil, who attended your father during his last illness. How long have you known Dr. McNeil?

A. 25 years.

Q. Has he been your family physician?

A. Mine, yes.

Q. Have you become an intimate acquaintance of his? A. He is a client of mine.

Q. He is a client of yours? A. Yes.

Q. During the course of the period in which he treated your father, did you consult with him frequently? Did you see him often? A. Yes.

Q. In respect to the 40 units of Southwestern

(Testimony of Floyd K. Sullivan.)

Freight Lines, I believe in response to a question from Mr. Barnes, you testified that the common stock was held in a voting trust. Isn't it a fact that all the stock constituting the units was [190] held in that trust?

A. Yes, because the preferred was convertible.

Q. I see. Yesterday when you were being cross examined with respect to the events that occurred on November 24, 1943, and I believe this is correct although I am not sure, you met with your father and mother at the apartment house with Mr. Triplett. Where was that apartment house located?

A. It was the Bonnie Lee Apartment house at 840 South Hobart.

Q. That is the apartment house owned by the corporation securities which have already been referred to in this proceeding? A. Yes.

Q. On that date did you observe the condition of the health of your father? A. Yes.

Q. What was your opinion of it?

A. He was in good health.

Q. Did he live at that apartment house?

A. No.

Q. What was he doing there, if you know?

A. Well, having a large interest in it he spent a great deal of time in assisting in the management of it.

Q. Was he connected with the management in any way, do you know? [191]

A. Yes, he was president of the corporation.

Q. You mentioned he had a large interest in the corporation. What do you mean by that?

(Testimony of Floyd K. Sullivan.)

A. Well, substantial amount of money represented by stock ownership in it; some 800 or 900 shares.

Q. Do you have any knowledge of how many shares outstanding there were?

A. 200, I believe—that is, 2000.

Q. Was he the largest single stockholder, if you know? A. Yes.

Q. Yesterday on direct examination we referred to certain transfers of securities included in the agreement between your mother and father dated November 24th, and I neglected to ask you about transfers concerning the Chicago City Railway Corporation bonds and the Union Trust Deed funds, and as well United States Governments referred to in that agreement and described. Was a transfer made of the Chicago City Railway Bonds?

A. I don't believe so.

Q. Was a transfer made of the Union Trust Deed funds which are designated as Union Bond Fund A? A. I don't think they were.

Q. Was a transfer made of United States Governments? A. No.

Q. Do you know why none of these transfers were effected? [192]

A. Well, I apparently overlooked the Chicago Railway and the Union Bond A. But the Governments could not be transferred.

Q. You say they could not be. Will you explain that?

A. Well, they weren't bearer form bonds. They

(Testimony of Floyd K. Sullivan.)

were in the name of co-owner Frank K. or Hattie B. Sullivan in Series E, F or G's. You cannot transfer those bonds into another name, unless one co-owner dies. Then you can re-transfer them into the name of the remaining owner or, I believe, under certain divorce proceedings; other than that the only way you could transfer them would be to sell them, cash them in and re-issue. And in the case of Series G Bonds the price declines from the issuance date, so that if that were done there would be considerable loss involved in doing it.

Q. With respect to the Governments, that was the situation? A. Yes.

Q. Insofar as the transfer was concerned. The loss involved necessitating, as a result of the necessary sale of the bonds, in order to secure a re-issue of them? A. That is right.

Q. Did you advise your mother and father that these bonds could not be transferred and it would be inadvisable to transfer them because of the matters you have just stated? [193]

A. I think both Mr. Triplett and myself advised them of that.

Q. But they none the less considered that after that agreement they owned one-half of the bonds.

The Court: Don't lead your witness or ask him what somebody else considered. He wouldn't know, anyway. I wouldn't consider his testimony if he stated it. You are leading the witness.

Mr. Jones: Let the question be stricken.

(Testimony of Floyd K. Sullivan.)

By Mr. Jones:

Q. During the times in question here and from about September of 1943 on, were you familiar with the financial worth of your parents? A. Yes.

Q. What were they worth, if you know?

A. Well, between \$150,000.00 and \$175,000.00.

Q. Yesterday on cross examination you answered Mr. Barnes with respect to the question he asked you concerning gifts, prior gifts from your parents, your father or your mother, either one. I am not clear in my own mind what your answer was, and I will now ask you if you received any gifts from your parents, any prior gifts to the gift involved in the list of securities described in the letter of November 19th to the Nelson Douglass & Co.

A. Well, I believe my answer was no. Thinking back [194] that is not correct.

Q. On the basis of your having devoted further thought to the subject, what is your answer now?

A. Well, back in 1930 he bought a lot in Beverly Hills and built a house, and gave it to us. I was thinking that he was referring more to gifts of this nature—

Q. Comparable to the securities?

A. —that we had to file gift tax returns on, and so forth.

Q. Where was that house located?

A. In Beverly Hills.

Q. Was that the house you stated you had mortgaged? A. Yes.

Q. What was the reason for mortgaging the house? You may have answered this yesterday, I

(Testimony of Floyd K. Sullivan.)

am not sure. My notes aren't too complete on it.

A. Well, I had incurred quite a lot of debt principally in connection with considerable medical expense with my wife, and at that time I was in a partnership by the name of Gibson and Sullivan in the securities business, which was in the depth of the depression, and was losing money. To try to hang on that I had borrowed money on the house, to clean up my bills, and also make it possible to stay in business.

Q. You mentioned that you were in business in a partnership. When was that partnership formed?

A. 1931.

Q. What business was it engaged in?

A. General securities, general brokerage business.

Q. How much did you invest in the business?

A. Nothing.

Q. How did you operate?

A. Well, my father deposited some twenty-five thousand dollars' worth of high grade negotiable bonds with the Security-First National Bank. And we would use those as collateral, as our sales and purchases.

Q. Would the deposit of those bonds, as you have described, in the stock and bond business constitute its working capital?

A. Well, we never touched the bonds themselves or sold any of them, to use money. We had some money as current working capital besides that, maybe a couple of thousand dollars.

(Testimony of Floyd K. Sullivan.)

Q. Is it necessary in the stock and bond business, to, as you mentioned, have on deposit collateral?

A. Well, if you purchase a security from another house and re-sell it to a buyer, it sometimes happens that you have to pay for the security before your purchaser pays you. So you must be able to go to the bank and borrow if you don't have the necessary cash in the business, in order to facilitate that contract. [196]

Q. That deposit, then, provided a basis for additional working capital.

A. In that respect, yes.

Q. How long did you remain in that business, that partnership? A. Until August of '34.

Q. What happened then?

A. I decided to eliminate the partnership because we were losing money.

Q. Was it insolvent?

A. No, not strictly speaking.

Q. But it was dissolved. A. Yes.

Q. Did either of the partners suffer losses?

A. Yes, both of us.

Q. What was your loss?

The Court: I am wondering why that is material. How does that help your case, Mr. Jones?

Mr. Jones: It is preliminary. On the basis of an offer of proof, instant to this loss Mr. Sullivan found himself indebted to his father in a substantial amount of money and his father thereafter agreed to discharge the obligation to him and return for the trade of some property which Mrs. Sullivan inherited just about this time.

(Testimony of Floyd K. Sullivan.)

The Court: I still don't see where that particularly [197] advances your case. I won't stop you. Go ahead.

Mr. Jones: It is not too pertinent. I think we can drop it.

The Court: I am not telling you to drop it. I am just wondering if you think it advances your case. Go ahead.

By Mr. Jones:

Q. What did you do to discharge your loss, your portion of the loss in the partnership?

A. I transferred title to a duplex that Mrs. Sullivan had inherited, as complete payment for the loss.

Q. What was the amount of your loss?

A. \$12,000.00, roughly.

Mr. Jones: Incidentally, for the record, the Mrs. Sullivan he referred to who inherited the property is his wife; not his mother.

The Court: You had better bring it out by testimony. I have great regard for attorneys' statements, but I can't take them as evidence.

By Mr. Jones:

Q. When you refer to Mrs. Sullivan, whom do you mean? A. Alice C. Sullivan, my wife.

Q. She inherited a piece of property?

A. Yes.

Q. What did you say you did with that property?

A. We transferred it to my father and mother in repayment for the loss sustained in the business.

(Testimony of Floyd K. Sullivan.)

Q. If you know, approximately, what was the value of the property that you transferred in discharge of the loss, the obligation?

A. Well, it probably wasn't at that time—as a guess \$7,500.00.

Mr. Jones: Thank you. That is all. You may have the witness if you have any recross, Mr. Barnes.

Recross Examination

By Mr. Barnes:

Q. On this particular situation about which you are speaking, I understand now that your father did advance certain collateral to you in prior times, while you were in financial difficulty, is that correct? A. Yes.

Q. He never made a gift outright to you of any of those stocks and securities which were advanced as collateral? A. No.

Q. Were the \$50,000.00 United States Series G Savings Bonds cashed after your father's death, Mr. Sullivan, were they cashed at any time subsequent to the death of your father?

A. They automatically are cashed on the death.

Q. They were automatically cashed?

A. Yes.

Q. On death? A. Yes. [199]

Q. Those are payable to the survivor, is that correct? A. Correct.

Q. The money was paid to your mother, Hattie B. Sullivan. A. Yes.

Q. You had been acquainted with Dr. McNeil

(Testimony of Floyd K. Sullivan.)

for 25 years, I believe you testified. A. Yes.

Q. Did you recommend your father to Dr. McNeil? A. Yes.

Q. When did you recommend that your father see Dr. McNeil?

A. Well, it was around the early part of December.

Q. Why did your father want to go to see a doctor at that time?

A. Well, he developed this yellow complexion and I wanted to take him up there to see what he thought about it.

Q. What did your father say about his previous treatment at the Cedars of Lebanon Hospital when he was requesting further advice from a physician?

A. He said they didn't know what they were doing, they didn't know anything about it, didn't tell him there was anything wrong with him.

Q. What did he tell you regarding their recommendations to him, Mr. Sullivan? [200]

A. He didn't say they had any recommendations.

Q. Who recommended that your father go to the California Lutheran Hospital?

A. Dr. McNeil.

Q. Did your father first call on Dr. McNeil after you had introduced him to the doctor, introduced your father to the doctor?

A. I made an appointment and took him in there.

Q. You took him in yourself to see Dr. McNeil?

A. Yes.

(Testimony of Floyd K. Sullivan.)

Q. Can you fix in your own mind the date when you first called on Dr. McNeil with your father?

A. Well, it must have been about—not more than 10 days prior to the time that he went into the California Lutheran, because the only thing he prescribed for him when we went in was hot packs for a week, to try to draw out what inflammation he considered was present.

Q. Those were hot packs where, on the abdomen, the abdominal region?

A. Yes, back and front.

Q. You think your father had any suspicion he had a cancer, Mr. Sullivan?

A. No, I don't.

Mr. Barnes: I have no further questions.

Mr. Jones: Do you have the estate tax return?

Mr. Barnes: Yes. We will introduce that in evidence before we are through.

Redirect Examination

By Mr. Jones:

Q. Mr. Sullivan, I am showing to you now the estate tax return Form 706 for Frank K. Sullivan, which I have received from Mr. Barnes, and which has been stamped as the duplicate. A short time ago Mr. Barnes asked you some questions with respect to the \$50,000.00 in U. S. Governments. You stated, if I recall, that they were automatically payable or redeemable upon the death of one of the co-owners, and if I recall correctly you stated that the proceeds were paid to your mother.

Now, I show you Schedule B of this estate tax

(Testimony of Floyd K. Sullivan.)

return and refer particularly to Item 6. You signed this estate tax return, did you not, as the executor of the estate? A. Yes.

Q. You were the executor at the time this estate tax return was prepared? A. Yes.

Q. Referring to Item 6 of Schedule B, will you read that and see if it refreshes your recollection with respect to the disposition of the proceeds of those bonds?

A. Yes, that is true. But— [202]

Q. Wait a minute. Before you say that is true, wait a minute. Your recollection is now refreshed. On that basis, what disposition was made of the proceeds of those bonds subsequent to their redemption, as the result of the death of your father?

Well, they were turned in to the Federal Reserve Bank downtown for collection.

Q. That is right. Now, you received the proceeds. What did you do with the proceeds?

The Court: Don't tell your witness what he did. Let him testify. You are going to badly affect the testimony of this witness if you don't quit suggesting to him.

Mr. Jones: Strike the question, Miss Reporter. By Mr. Jones:

Q. After you turned in the bonds for redemption, what happened?

A. I don't recall offhand what I did with the proceeds immediately.

Q. Is the estate tax return, which I have shown you, or more properly was it prepared with respect

(Testimony of Floyd K. Sullivan.)

to all of the assets of the estate you had any knowledge of? A. Yes.

Q. Is that correct? A. Yes.

Mr. Jones: Do you want to introduce this now, Mr. [203] Barnes?

Mr. Barnes: Yes, it should go in evidence. The Respondent would like to offer that return in evidence as part of the record.

Mr. Jones: We would like it as a joint exhibit.

The Court: What are your numbers and letters?

Mr. Jones: The next one coming up would be 12-L, if we follow the sequence of the exhibit numbers in the stipulation.

The Court: Let the instrument be admitted in evidence, that is, the estate tax return of the Estate of the deceased Frank K. Sullivan. It will be admitted in evidence as Joint Exhibit 12-L.

(The tax return above-referred to was received in evidence and marked Joint Exhibit No. 12-L.)

Mr. Barnes: That is all, Mr. Sullivan.

The Court: I want to ask this witness a question or two.

By the Court:

Q. You said something about playing golf with your father. Up to what time did you play golf with him?

A. Up until a few days before he went into the Cedars we would play.

Q. Would you play, would you say, with him once a week?

(Testimony of Floyd K. Sullivan.)

A. Once a week and sometimes once every two weeks. I [204] think the last time we played was in November, somewhere along the line in November.

Q. Give me the best idea you can as to how active your father was.

A. He was a very rugged active man.

Q. Just a moment. On the golf grounds, in comparison with the ordinary pace with which golfers play, if there is any ordinary pace. Was he as active as you were?

A. I wouldn't say that, no, not at 77. He could play 18 holes on a flat course or 9 on a hilly one with no ill effects or trouble.

Q. Did he go at a reasonable pace?

A. Yes.

Q. Or did he have to go slower?

A. Yes, he could keep up with any crowd.

Q. What did your father talk about? That is a very broad question. Did he talk about his ills?

A. No, he was never one to—never had any, to my knowledge.

Q. He was not given to talking about the state of his health?

A. No, he was not. Nor did he have any ills, to my knowledge of any consequence, ever since I have known him.

Q. Do you know of any plans that he had for the future? A. In what respect, your Honor?

Q. Any respect, at that time, the fall before he died. A. No, I don't.

(Testimony of Floyd K. Sullivan.)

Q. Was he making any plans that you know of for the future?

A. No. The only plans he would make would be for trips, and he had already just previously made one to Minneapolis and back, to see his sister.

Q. You know of no other plans he had in mind?

A. No, I do not.

The Court: That is all I will ask.

(Witness excused.)

The Court: We will take a recess at this time for 10 minutes.

(Short recess taken.)

Mr. Mosher: Mr. Triplett.

Whereupon,

CLYDE TRIPLETT,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Clyde Triplett.

Direct Examination

By Mr. Mosher:

Q. Where do you reside, Mr. Triplett? [206]

A. Los Angeles.

Q. Your occupation? I am a lawyer.

Q. You are engaged in practice in Los Angeles?

A. I am.

Q. For how many years? A. Since 1924.

(Testimony of Clyde Triplett.)

Q. During the course of your practice have you had occasion to deal with tax matters?

A. I have. I have specialized in tax matters.

Q. You, of course, are admitted to practice before this court and also the Treasury Bar?

A. I am.

Q. And as I understand it, you have also been a California estate inheritance tax appraiser for some years.

A. I still am; have been since 1939. Prior to that time I was chief attorney for the State of California in the Southern District, inheritance tax division.

Q. Did you know the decedent Frank K. Sullivan, whose estate is in controversy in this case?

A. I did.

Q. Did you know his wife, Hattie B. Sullivan?

A. I did.

Q. And their son, Floyd Sullivan?

A. I did. [207]

Q. When did you first become acquainted with them or any of them?

A. The first time I became acquainted with any of them was when they came to my office on September 27, 1943.

Q. Who came to see you on that occasion, Mr. Triplett?

A. All three of the persons you have mentioned, Mr. Sullivan, Sr., the deceased, and his wife and the son Floyd Sullivan, or Lloyd Sullivan.

Q. At that time a conversation ensued?

(Testimony of Clyde Triplett.)

A. It did.

Q. Do you recall the substance of that conversation? A. I do.

Q. Will you please state it?

A. The three of them came to my office at 10:00 o'clock that morning, about that time. The appointment was 10:00 o'clock. They introduced themselves and Mr. Sullivan, Sr., Frank K. Sullivan, told me that he and his wife wished to make some gifts to their son. They wanted to consult me with reference to gift tax returns and what gift taxes would be, if any.

I told them what the exclusions and exemptions were. They could each give their son—I think I said \$33,000.00, that year, providing they hadn't made any previous gifts.

I asked them if they had made any previous gifts to anyone. They said no, except Christmas and charitable, small [208] gifts. I told them they could give their son each \$33,000.00 without there being any federal gift tax.

Mrs. Sullivan said, "Well, we didn't have in mind giving him that much." She said, "What we wanted to give him, what we want to give him is something that will give him some additional income."

I think it was the son said he was employed as a salesman with Nelson Douglass & Co., securities brokers in this city, and that the security business wasn't very good.

His mother, that is, Hattie Sullivan, said that

(Testimony of Clyde Triplett.)

he had a child and that they were very fond of the child and it was getting expensive, to the expensive age and they wanted to give him some more income besides what he was making. But that they had in mind only giving him about half of what I suggested they could give him.

I told them that there would be a state gift tax, told them what the exemption was, \$5,000.00 from each, plus the annual exclusion. And that even at \$30,000.00 they would have to pay a California gift tax.

Then I asked them who was going to make the gift, who owned the property or whatever they were going to give him.

They said they both owned it. They said they owned everything together.

I asked them how they owned it, how their titles [209] were. They said everything they had was in joint tenancy between Mr. Sullivan, Sr. and Hattie, his wife.

Then I asked them—I told them sometimes joint tenancy is rather confusing in California, sometimes it is held to be community property. I asked them where they acquired the property, where it came from. They told me they were married in the middlewest. I don't remember what state it was. And that he had been in the coal business, Sullivan Coal Company, or a similar name in Minneapolis, Minnesota, and that is where he made his money.

I asked him if he had ever inherited anything

(Testimony of Clyde Triplett.)

from anybody, and they told me they hadn't. He said all his money he had made in the coal business in Minneapolis.

Well, I asked him where the coal business was and we had a considerable conversation, because I had lived in Minneapolis and I recall him asking me where I had lived, and we talked as to whether he had ever delivered coal to our house. There was considerable conversation about Minneapolis, Minnesota, and Minnesota, and I told him I didn't understand why people left a beautiful state like Minnesota and came to join this race out here. And I recall him saying Minnesota was better for business, but when you quit business it was better to be in California, particularly as you get older.

He said you could play golf all the year around, and I recall Mrs. Sullivan saying that she spent most of the [210] summer time slapping mosquitoes in Minneapolis. We talked about golf. He asked me what course I played, and I told him I had for years played Bel-Air. I had just quit or was about to quit because I couldn't make any score on that course. He told me he couldn't, either, and the course was too hilly. He preferred—

Mr. Barnes: If the Court please, I believe the testimony of this witness is a little extensive for the type of question asked him in this particular instance.

I believe the question was the course of the conversation, but I believe there has been no showing all this is particularly material to the subject now which is the execution of these documents.

(Testimony of Clyde Triplett.)

The Court: Don't go into too much detail, Mr. Triplett. Go ahead with the conversation. I think it might be helpful.

The Witness: He told me with golf he played to get a better game; he could get a better game than I could. I couldn't get under 90 and he could. But he preferred Brentwood and the South Course at Los Angeles. There was considerable conversation about golf.

I told him that they would have to make up their minds what they wanted to give the boy; what specific thing was the first thing to do. It was my opinion that—I asked him, too, whether he had made any money after he came [211] to California or increased his wealth. He told me he was worth more when he came to California than he was at that time, that he had made some pretty sour investments, but he was in the process of working the last of them out and getting most of his money out, but that he had lost some money.

He told me that his son didn't like some of his investments and thought they would give the son some of the securities, stocks. So I told them to make a detailed list of everything they owned and select the things that they wanted to give to the son, items, and bring it in to me and that I would attend to the details or tell them what to do, and attend to the making of the different tax returns and the computation of the state gift tax when the returns were due. Then they left my office. I would say they were there an hour or so.

(Testimony of Clyde Triplett.)

Q. Did you receive the list, Mr. Triplett?

A. I received a list at a later date.

Q. Do you have that list or a copy of it?

A. I have the original list that was given to me. Some other things were given to me, deeds were given to me and the documents, but this is the list that was given to me.

Q. Under what circumstances did you receive this, Mr. Triplett, that is, was it mailed in or brought in?

A. I believe it was brought to my office, but I have no recollection of the occasion on which it was brought there. [212]

Q. Do you know when with reference to the date of this first interview with the Sullivans it was brought to you?

A. It was brought before Mr. Sullivan came in the next time, which was some several weeks later. I would say in the month of October.

Q. You saw neither Mr. Sullivan, the deceased, nor Floyd, the son, nor the mother for several weeks after that first interview?

A. That is right; two weeks, at least.

Q. Do you know who prepared this list, that is, in whose handwriting it is?

A. I do not. Some of the notations on there are in my handwriting. Those letters "E" in red pencil, and the checks, but the pen and ink—the pen and ink there is not my handwriting. And that is the list as it was delivered at my office.

Mr. Mosher: If the Court please, we will offer

(Testimony of Clyde Triplett.)

the list that Mr. Triplett has referred to, we will offer it in evidence as the next exhibit in order.

The Court: Petitioner's Exhibit 13, is it?

The Clerk: That is correct, your Honor.

The Court: Petitioner's Exhibit 13, the list just identified, is admitted in evidence.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 13.) [213]

By Mr. Mosher:

Q. Subsequent to the first interview in your office, Mr. Triplett, when was the next time, if there was such a time, that you consulted with Mr. and Mrs. Sullivan with reference to this gift or any other matters?

A. Mr. Sullivan came in without an appointment some weeks after September 27, 1943.

I would say about the middle of October, along there, and they came in without an appointment. I believe he brought some of the deeds or instruments mentioned on this list. He talked some more about Minnesota and golf and told me he was having some difficulty finding some of the things I had called for. He said as soon as he got them ready, the balance of them, they would come in and see me again. And he told me that they had not determined or decided what specific items they were going to give the son. That was all the conversation at that time.

Q. Did you subsequently have a conversation with Mr. or Mrs. Sullivan?

(Testimony of Clyde Triplett.)

A. I had an appointment with them at my office on November 9, 1943, at 10:30 a.m.

Q. Who was present at that time, Mr. Triplett?

A. Mr. and Mrs. Sullivan and I believe the son was also there.

Q. You had a conversation with them at that time? [214]

A. I did.

Q. You recall the substance of that conversation?

A. They told me—we went over the list of the things, this list that has been introduced in evidence, and identified items which they said they had decided they were going to give to the son. I made some notations on that.

They also at that time brought—left at my office the balance of the deeds, the notes, trust deeds and other items that represented the things that they owned.

At that time I examined them and I found that one piece of real estate wasn't in joint tenancy at all. There may have been one or two other items, I don't recall. But I remember distinctly there was one piece of real estate that was not, it was in the name, in his name, Mr. Sullivan, Sr.

I suggested to him, I told him that in my opinion it wasn't a good thing for him to leave, he or his wife to own their property in joint tenancy. He told me when they came to California somebody had told them to put everything in joint tenancy.

I told him that I didn't think that was a good idea. It wasn't community property, never had

(Testimony of Clyde Triplett.)

been, and that if one of them died it went on to the survivor, but that under the 1942 amendment to the Revenue Code if they are in joint tenancy and he were to die it would all be included in his estate. [215]

I suggested to them that—I told them I thought it advisable to break their joint tenancy and give up their right of survivorship and divide the property between them, either as tenants in common or either—better yet, the things that could be actually divided in kind be divided in kind.

I told them I didn't think there would be any gift tax involved. I thought it was an exchange. And I told them that he was taking some chance, however, if his wife should die first, and that after they reached such a division half of it would be in her estate. Not that the amount was so large it made much difference in tax consequences, but it would make some additional probate expense. I explained that to them.

I don't believe that he told me at that time—at that time I think he said that they would think it over and call me back. And I kept all of those things in my office pending the receipt of their instructions.

Q. Was that all of the conversation at that time, as you recall?

A. Substantially so.

Q. Subsequently did you receive advice from them as to what they, if anything, wanted you to do in this connection?

A. I did. [216]

(Testimony of Clyde Triplett.)

Q. How did you receive that communication?

A. My recollection is I received it by telephone call. Mr. Sullivan, Sr. called me and told me they had thought it over, talked it over and that they thought my advice was sound, and to go ahead.

I forgot one thing. In the conversation at the conference on November 9th, when they selected the securities they were going to give to the son, I told them to take the securities to a brokerage office. The son said they would take care of that at Nelson Douglass & Co.

I told the son to write a letter or to have his father and mother write a letter directing them to make the transfer, and to state it was a gift to him, so that he would be sure to have as of that date a clear written record it was a gift, as it might some day be used in connection—if there was any question as to his cost basis on those items. That advice was given at the November 9th meeting, the November 9th conference.

Q. Digressing a moment from the previous line of questioning, to follow this up, this subject that you just brought up, did you do anything after that time with reference to the gift to Floyd K. Sullivan?

A. No, except I believe that Floyd Sullivan called me on the telephone or read me a letter which he had written or somebody had written to the Nelson Douglass & Co., and asked [217] me if I thought it was all right.

I said it was and for them to send me a copy

(Testimony of Clyde Triplett.)

of it, because I would need it in connection with the preparation of the gift tax return.

Q. I hand you, Mr. Triplett, what purports to be a duplicate of a federal gift tax return for the year 1943 for the donor Frank K. Sullivan, and ask you if you can identify that document.

A. I can; I prepared it.

Q. And the signature on this document is that of—

A. That was not prepared, counsel, until after the end of the year, 1944.

Q. Can you identify the signature on that?

A. I can. Signed by Floyd—well, that—I don't know about that Floyd K. Sullivan. I know my writing on there, my name is signed twice in my own handwriting. A notary in my office, I believe, that Floyd K. Sullivan—this must be a copy. That is the handwriting of my secretary, that Floyd K. Sullivan (indicating).

Q. That is not a duplicate return. This is the copy?

A. This is a copy, not an executed duplicate, I don't believe.

Q. The duplicates were filed and you perhaps didn't keep a third one. A. Yes. [218]

Mr. Mosher: I will introduce this in evidence, your Honor.

Mr. Barnes: May I examine that again just a moment?

Mr. Mosher: Yes.

The Witness: I want to—I don't know—that

(Testimony of Clyde Triplett.)

was my office copy. You said I didn't keep one; that was my office copy (indicating).

By Mr. Mosher:

Q. What I meant was you didn't have a third executed copy. A. No.

Mr. Mosher: Your Honor, maybe we can save some time at this time by deferring this offer until later, and maybe we can simplify it after conferring with counsel. I will withdraw—

Mr. Barnes: I have no objection to his introducing the duplicate. I have the original here in my file. I do not believe these documents are material to this controversy. I believe it is agreed that there was a purported gift made and the filing of a gift tax return, I assume, would be a matter of professional pride with Mr. Triplett, to see those details were followed out. We have no objection to the Petitioner offering that if they want to.

The Court: How is that material here?

Mr. Mosher: I don't think it is too important. We [219] want to have the record clear on the fact these were completed gifts, intended as such by all parties, during the life time of the decedent. That the plan was—

The Court: The objection will be overruled in that regard. It may complete the story.

Mr. Mosher: I do believe, though, your Honor, that—I have a group of gift tax returns, donors and donees, state and federal, and some state clearances. That is, notice of determination. I may be able to offer them as a single exhibit and save some time.

(Testimony of Clyde Triplett.)

The Court: We will pass on to something else then. I wouldn't think it would be necessary or particularly would it further the case to put all those matters in, so far as the gift is concerned. I do appreciate it is a part of the story.

Mr. Mosher: Perhaps I can clear it up by testimony, very briefly.

By Mr. Mosher:

Q. You prepared tax returns for Mr. and Mrs. Sullivan in connection with the gift to their son Floyd about which you have testified?

A. I prepared both donees and donors gift tax returns, federal and state, in February of 1944, and transmitted them to the proper offices, government offices, together with payment of check for the State Tax of California. [220]

Q. Was any federal tax due as disclosed by those returns? A. Yes.

Q. Was any state tax due as disclosed by those returns? A. Yes.

Q. Do you recall the amount?

A. No, I don't. I may have it in correspondence, whatever it was. I computed it and I sent a check along with the return.

Q. Was any deficiency, to your knowledge, ever proposed with reference to either the federal or state gift tax return of either of these parties to which you have referred?

A. Not to my knowledge.

Mr. Mosher: I think with that, your Honor, we will not attempt to introduce those documents.

(Testimony of Clyde Triplett.)

By Mr. Mosher:

Q. Now, going back, Mr. Triplett, to the time that you were advised to proceed with the plan of dividing up the properties, did you undertake to consummate that plan? A. I did.

Q. What did you do with that, in that connection?

A. Well, at first I consulted a title company as to the mechanics, with reference to the real estate and trust deeds. Then I prepared assignments of each trust deed and note from both Mr. and Mrs. Sullivan, and [221] assignment from Mr. Sullivan, as I recall, of an undivided one-half interest to her from Mr. Sullivan as her separate property. And I prepared deeds both to Mr. Sullivan and to Mrs. Sullivan back from Mr. Sullivan as to an undivided one-half interest as her separate property.

I prepared an agreement, proposed agreement which, I believe is in this agreement or contract between them that counsel speaks of. I prepared it. I attended the execution of all those documents.

Q. I hand you, Mr. Triplett, the stipulation of facts which has been introduced in this matter; appended to it are certain exhibits which I will ask you to examine and state whether the documents to which you have referred are those of the same description annexed to this stipulation.

A. This copy of the will which is Exhibit 5-E I prepared; Exhibit 6-F I prepared; and 7-G; and 8-H; and 9-I; 10-J. That is all, although they in-

(Testimony of Clyde Triplett.)

clude, each one of those exhibits includes several documents. I prepared all of those.

Q. The originals of those documents, I take it, are the documents to which you referred in your testimony as having prepared them.

A. That is right. I prepared a contract. I don't see it there.

Mr. Jones: It is not there. [222]

Mr. Barnes: If the Court please, I believe that contract is attached to the petition. It would not be a part of the stipulation.

The Witness: When is that contract dated?

Mr. Jones: November 24th.

Mr. Barnes: November 24th.

The Witness: That is right.

Mr. Mosher: Mr. Barnes, I hand you a copy of what appears to be the original of that. Can it be stipulated the copy attached to the petition is a true copy of this contract?

Mr. Barnes: I will so stipulate.

By Mr. Mosher:

Q. Now, Mr. Triplett, will you examine this document which purports to be a contract dated the 24th day of November, 1943, and state whether that is the contract which you have referred to as having prepared it?

A. Yes, I prepared it and attended its execution.

Q. Were these various documents executed in your presence or under your supervision?

A. They were.

(Testimony of Clyde Triplett.)

Q. Will you state the circumstances under which they were executed?

A. On November 24th—I don't have an appointment in my book, because there wasn't an appointment made previous [223] to that time. On November 24th I received a telephone call from either Mr. Sullivan or Floyd Sullivan, the son; I can't remember which. I think it was the son. He asked me if I had the documents prepared, and I said I had.

He told me that they were just leaving the Cedars of Lebanon Hospital.

I asked him what he was doing at the hospital.

He said his father was there for a check up or observation, and that his father was going to an apartment house he was running, this Betty Lee or Kitty Lee, or something.

Q. Bonnie Lee.

A. Bonnie Lee. And that he had to be there at a certain hour and wondered if I could bring the documents out there, because his mother, that is, Mrs. Sullivan would be with them and they could sign them there.

I checked my time, and I said I could. So I met them out there at that apartment house, the address they gave me. I didn't write it down in my book. I noted it, I think, on a little slip of paper. But I went there and saw them.

The Court: Before you get away from it, gentlemen, this contract you have identified, the contract about which the witness has testified with

(Testimony of Clyde Triplett.)

the one copy of which is attached to the petition, I don't know whether you intended to put [224] that in evidence or not. The petition is not evidence. I am just calling your attention to the fact the petition is not evidence.

Mr. Barnes: I believe the stipulation of facts incorporates by reference that contract and states it is the contract of the parties.

The Court: Very well.

Mr. Mosher: Your Honor, to avoid any possible question about this, we would like to introduce the original contract or offer it in evidence, because this is basic in this case. We don't want any legal question to arise on that or any question as to the sufficiency of the record in that connection. Although I don't like to clutter up your Honor's file.

The Court: We don't want any more record than is necessary. I didn't want you to overlook something, as you say, that might be basic.

Mr. Mosher: I appreciate that, your Honor. We offer this contract dated November 24, 1943, in evidence.

Mr. Barnes: No objection.

The Clerk: No. 14.

The Court: The instrument offered is the instrument you prepared, Mr. Witness?

The Witness: I did.

The Court: Let the instrument be admitted in [225] evidence as Petitioner's Exhibit No. 14.

(Testimony of Clyde Triplett.)

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 14.)

By Mr. Mosher:

Q. Now, Mr. Triplett, you prepared some wills for Mr. and Mrs. Sullivan, didn't you?

A. I did.

Q. Will you state to the Court the circumstances under which you did that work?

A. I didn't do that until later, after the meeting in the apartment, at which time all these other documents, these exhibits I have identified and the contract were executed, in some apartment in the building. I don't know where it was. We went up on one of those run-your-own elevators. I took my notary public along with me.

We met Mr. and Mrs. Sullivan in the apartment designated, designated over the telephone.

Q. Did you know at the time of your meeting on November 24th whether or not Mr. and Mrs. Sullivan had a will in force?

A. I don't recall whether I did or not. I talked to them about it on that occasion. I had no recollection talking to them on previous occasions; I may have.

Q. What was said on that occasion with reference to the subject of a will or wills? [226]

A. After these various exhibits I have identified were signed by Mr. and Mrs. Sullivan, notarized and the contract was signed and I believe

(Testimony of Clyde Triplett.)

notarized, I told Mr. and Mrs. Sullivan I thought it would be a good idea for me to look over the wills and if they had no objection that I would, and they told me that they already had wills, I think. I know he said he had a will. He left everything to his wife in it. And I think she told me she said she had one leaving everything to him.

I said I thought it might be a good idea for him and his wife, for each of them, to leave the other a life estate, with the remainder over to the son, and that would avoid, in the event of either, possibly a subsequent probate proceeding and expense tax.

Mrs. Sullivan said that she thought that was all right, because she said if Mr. Sullivan died Floyd would look after her affairs, anyway.

But Mr. Sullivan said that he didn't like the idea but if Mrs. Sullivan died he thought he could look after his own affairs.

Anyway, I said, "Give me the wills." They didn't have them there. This was at kind of an office. They had some desks in there. He didn't have any wills. The wills were—one will, anyway, Mr. Sullivan's will was sent to me at a later date; only a few days later. [227]

I prepared a new will for each of them, the one I have identified here as being Mr. Sullivan's will, and I also prepared her will. I attended their execution at a later date.

Q. Would you state the facts concerning the execution of those wills, that is, when and where that was done?

(Testimony of Clyde Triplett.)

A. Well, the day the wills were executed, which was November 30, 1943, I telephoned to Mr. Sullivan or to their home, told them that the wills were ready to be executed and that I was going to Beverly Hills. They lived in Beverly Hills. And if they wanted me to I would bring them by on my way out and we would sign them if they had a witness, another witness.

I talked to Mr. Sullivan on the telephone and he said that would be fine, that they would get a witness in the neighborhood, and to come along whenever I got there. So I went out there.

When I got through—I was on my way to a meeting—I stopped at the house. Mr. and Mrs. Sullivan were there. They read the wills. I again explained that life estate provision and I had not incorporated it in his will and had in hers. They said that was what they wanted.

I explained why I had changed the executor from a bank to a son, making the bank the alternate executor. Mr. Sullivan went and got some neighbor, the man that appears as [228] a witness on the exhibit, by the name of Abraham, that I had never seen before, from some place in the neighborhood. He came in, and they signed the wills, and I kept a copy and left them the originals. That is the last time I ever saw either Mr. or Mrs. Sullivan or had any conversation with them, I believe.

I may have had some conversation with Mrs. Sullivan at the time the gift tax returns were prepared. If so, I don't recall it.

(Testimony of Clyde Triplett.)

The Court: When was the will prepared or executed, the date?

The Witness: It was executed on the date it bears, November 30, 1943.

By Mr. Mosher:

Q. Mr. Triplett, did you at any time during your meetings with Mr. Sullivan observe any physical infirmity in Mr. Sullivan?

A. I observed no physical infirmity, but at the time—infirmity, I don't know. The first meeting with Mr. Sullivan, he appeared to me to be a perfectly normal person. He smoked two or three cigars while he was in my office.

The time I met him out—the second time in the office he appeared to be—

Q. That was November 9th, now?

A. No, when he came in before November 9th, in October [229] sometime. The first time that he looked any different than anybody else in any respect was when I saw him out at the apartment house, when he signed the assignments, the exhibits which I have identified.

At that time—well, I talked with him about his condition. He looked kind of yellow.

Q. Prior to that time did he appear to you as a man in normal health? A. He did.

Q. Good health?

A. Appeared to me to be perfectly normal prior to that time.

Q. He appeared to be an energetic man?

A. Yes. He smoked an awful lot of cigars, and from what he told me he played golf regularly.

(Testimony of Clyde Triplett.)

Q. When you saw him at the Bonnie Lee Apartments he looked a little yellow?

A. Yes.

Q. That was on November 24th. How did he appear at the time that he executed the will, which you prepared?

A. He looked about the same. He still looked a little yellow. He was still smoking cigars.

Q. Did he at any time during your contact with him discuss with you his health or physical condition?

A. At the Bonnie Lee Apartments was the only time he did. [230]

Q. What did he say?

A. Well, I asked him what was the matter with him, why he had been in the hospital. He said that he had been over there, the doctors thought he had something wrong with his gall bladder. They had starved him to death—this is his language—starved him to death for three or four days and fed him a lot of paint, and the X-rays didn't show anything, and that he didn't think the doctors knew what they were talking about.

Q. That was the only conversation you had with him concerning his health or physical condition?

A. Yes.

Q. Mr. Triplett, was anything ever said during the whole of any of these conversations with Mr. or Mrs. Sullivan or their son Floyd to suggest to your mind that the gift of those securities to him was to save taxes or secure an economic benefit for Mr. or Mrs. Sullivan?

(Testimony of Clyde Triplett.)

A. No. You are talking about the gift to Floyd Sullivan?

Q. Yes. A. No.

Q. Similarly, was anything ever said to indicate that that gift or proposed gift was motivated by thought of death? A. No.

Q. The division of the properties, however, as I [231] understand it, were made at your suggestion? A. Wholly at my suggestion.

Q. And having in mind the saving of estate taxes, to some extent?

A. The idea of the dividing of those joint tenancy properties was my idea. I will take the responsibility for it. They never suggested it. I suggested it to them.

Mr. Mosher: That is all:

The Court: We will adjourn at this time until 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.)

————— [232]

Afternoon Session, 2:00 p.m.

The Court: Proceed.

Mr. Mosher: No further questions.

Whereupon,

CLYDE TRIPLETT,

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

(Testimony of Clyde Triplett.)

Cross Examination

By Mr. Barnes:

Q. Mr. Triplett, at the time of your employment with the decedent and his wife and I believe Mr. Floyd Sullivan on November 9, 1943, to which you testified on direct examination, you did discuss at that time the severance of the joint tenancy which was part of the property of the decedent, is that correct? A. Yes.

Q. Did you discuss with them the possibility that the changing of their ownership would necessitate the execution of the new will and carrying out a different plan for disposition of their assets by will?

A. I don't believe I did at that time. In fact, that didn't necessitate a new will.

Q. Did you discuss the possibility that it might necessitate a new will? [233]

A. I don't believe so. I don't believe the will was discussed until at the time at the apartment.

Q. I also believe that you mentioned the 1942 Act in connection with this joint tenancy situation. I think you were referring there, were you not, to the community property situation arising out of the 1942 Act, is that correct?

A. That is right.

Q. And the joint tenancy, the provisions pertaining to joint tenancy with which you were concerned in speaking to the Sullivans were the provisions which were in the Act both before and after the 1942 Act itself?

(Testimony of Clyde Triplett.)

A. Yes. I explained to them that if it remained in joint tenancy on the death of the wife I didn't think any of it would be includable in her estate, but if we split the joint tenancy, that it would be.

Q. In other words, it was your advice by splitting the joint tenancy you would create tenancies in common, the husband's estate would include only half as much property as it would have had he died prior to the execution of the agreement.

A. Tenancy that couldn't be divided in kind; if there were any items that could be divided in kind I told him there should.

Q. You discovered, did you not, that certain of the assets were not held by joint tenancy? [234]

A. I discovered one parcel was held in his name alone and I think there was another item, but I am not sure.

Q. Were you aware that some of these securities which were the subject of a transfer to Floyd K. Sullivan were also held in the sole name of Frank K. Sullivan?

A. I don't believe I was. I don't believe—they didn't bring actually the securities into my office. I took their word on that list. If the list showed that one was not, then I knew it. I can't recall without looking at the list.

Q. Now, if I understand the testimony with respect to the wills which you prepared for Mr. and Mrs. Sullivan, the will which you prepared for Mrs. Sullivan contained what provision with respect to her interest in any assets upon her death?

(Testimony of Clyde Triplett.)

A. Well, I have a copy of it here. It provided, I am sure, that it went all to him, that is, to the husband, if he survived. And then if he didn't, it went to the son and if he were not living, then it went to the son's wife and to the son's daughter and to some sisters-in-law.

Mr. Barnes: I have no further questions.

Mr. Mosher: I am not sure, your Honor, this is proper redirect. It is a small point I would like to ask Mr. Triplett to clear up as to something about this agreement. [235]

Redirect Examination

By Mr. Mosher:

Q. Mr. Triplett, referring to Exhibit 14, page 2, under the heading "Notes Secured by Trust Deeds" it reads: "Five (5) promissory notes secured by trust deeds, as follows:—" and then it appears that only four items are listed.

Can you explain that?

A. Yes. That list I gave you, which is an exhibit here, I believe you will find five trust deeds and notes listed. In writing this agreement we made a mistake and put four of them in. I had the assignments of the notes and trust deeds which are exhibits, I have identified, made out for the five trust deeds and notes, and this is just purely an omission.

Now, you will notice there is an initial on here. I guess that was only for the change of the town.

(Testimony of Clyde Triplett.)

It is initialled "O.K." out there, at the time it was signed.

Q. That is on page 3?

A. On page 3. But that was purely an omission in my office, and I considered it remedied by the fact I actually had assignments in the file.

Q. The assignments of the five were made and that coupled with the general language of the agreement took care of the whole thing?

A. I thought so. [236]

Mr. Mosher: That is all.

Q. Let me ask you this: Mr. Witness, in some cases of this nature I have had evidence before me that the attorney in connection with transfers which might be questioned later by the government as transfers in contemplation of death, for one reason or another, the attorney advised that the party who was making the transfer have a physical check up. Now, did you give any such advice?

A. I did not.

Q. Did you ever play golf with Mr. Sullivan?

A. No, I never met him until he came in my office that day.

Q. What did he say to you as to anything about his health? A. At that time?

Q. Any time.

A. Well, the only time—the first time I ever talked to him about his health was when the trust deed—assignments of the trust deeds and notes and the contract was executed in that apartment house, after he was at the Cedars of Lebanon Hospital.

(Testimony of Clyde Triplett.)

That day, or when I got out there, I asked him what was the matter with him. They had called me from the hospital. I asked him what he was in the hospital for.

He said, as I have testified, that he was there for [237] observation or check up, and that they thought there was something the matter with his gall bladder, that his bile wasn't going through.

Q. Was that the only time the subject of his health was ever discussed between you and him?

A. That is the only time.

Q. Did he say anything about expecting surgery? A. No.

The Court: That is all I wanted to ask.

Mr. Barnes: No further questions, Mr. Triplett. Thank you.

The Court: This witness is excused by both sides, is he?

Mr. Mosher: Yes.

Mr. Jones: Yes.

Mr. Barnes: Yes.

The Court: You are excused for further attendance.

(Witness excused.)

Mr. Jones: Your Honor, please, we have consulted with the First California Company with respect to that problem concerning the 40 units of the Southwestern Freight Lines, which is referred to in the Exhibit 1-A attached to the stipulation.

I have received from the assistant comptroller of the First California Company a letter dated

today, which [238] explains the situation. I have supplied counsel for the government with a copy of that letter and in order to clarify the record I would like to offer at this time as our exhibit next in order this letter.

The Clerk: Exhibit 15.

Mr. Barnes: Well, I anticipate there could be considerable objection to that offer. In view of the fact the record is very ambiguous with respect to that item I will stipulate this explanation, which does make some sense out of an incomprehensive situation, may be accepted in evidence.

The Court: You are agreeing here that the statements here would be the evidence of this party, E. J. Lind, if he were placed on the stand.

Mr. Barnes: I so stipulate.

The Court: That is the effect of your understanding?

Mr. Barnes: Yes.

The Court: This isn't evidence at all, unless it is so agreed. Let the exhibit be admitted in evidence with that understanding as Petitioner's Exhibit 15.

(The letter above-referred to was received in evidence and marked Petitioner's Exhibit No. 15.)

PETITIONER'S EXHIBIT No. 15

FIRST CALIFORNIA COMPANY

Investment Securities

MAdison 6-5781

510 Spring Street

Los Angeles 13, California

December 3, 1947

Mr. Philip C. Jones,
417 South Hill Street, Rm 1075,
Los Angeles 13, California.

Dear Sir:

With reference to our letter addressed to you under date of November 26, 1947, referring to 40 units Southwestern Freight Lines in the name of Floyd K. Sullivan and Hattie B. Sullivan, common dated July 6, 1943, preferred stock dated June 1, 1943, and referred to as having been sent to transfer and new certificates issued, is in error.

The 40 units of Southwestern Freight Lines was received by us in the name of Frank K. Sullivan and Hattie B. Sullivan as joint tenants, and the original issuance date on these being, (common) July 6, 1943 and (preferred) June 1, 1943, were never transferred from that name to Floyd K. Sullivan prior to delivery to him because at that time these certificates were in the form of non-negotiable escro receipts and they were, therefore, re-delivered to Floyd K. Sullivan in the name of Frank K. Sullivan and Hattie B. Sullivan as joint tenants on March 15, 1944.

We also wish to point out on Page 2 of said letter, first paragraph, as to delivery date, this was incorrect and should have been March 15, 1944 and not March 15, 1947.

Yours very truly,

FIRST CALIFORNIA
COMPANY

/s/ E. J. LIND,
Ass't. Compt.

EJL:ls

The Court: Proceed.

Mr. Jones: I have some purely formal matters that, because of my personal knowledge, with respect to this estate, I should testify to, your Honor.

The Court: You should have suggested that before you started to try the case. We have no written rule on the subject. We certainly disapprove attorneys who try the case to testify.

Mr. Jones: I am conversant with the rulings where it involves a position of contest of that sort and with the recent decisions that have come down in the last week or so. These matters concern the actual transfer of the securities that were not transferred, but which were referred to in that agreement.

The Court: Is it a question of identification of instruments?

Mr. Jones: No, it is only the physical fact concerning the time when the transfers were effected. They were effected subsequent to the date of death

of Mr. Sullivan. If it is that you would prefer I not testify, we can eliminate it.

The Court: I am not going to say at once that you shall not testify. But, of course, there is an obvious reason why attorneys shouldn't testify in a case. They are interested parties and if a person is going to be a witness and knows that in advance, well, arrangements could be made for somebody else to try the case, as, of course, you must realize. You may go ahead and offer your evidence. I will see what the opposing counsel has to say about it. It may not be of such a nature he will object. I might sustain the objection if he did.

Mr. Jones: Do you want to interpose an objection?

Mr. Barnes: No. I believe I have none. I believe I know more or less the nature of this testimony and at the present time I will not interpose any objection.

The Court: Go ahead and we will see. Don't count in the future on getting in testimony by an attorney. You might not be able to do it. That is, an attorney that tries the case.

Whereupon,

PHILIP C. JONES

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Philip C. Jones.

(Testimony of Philip C. Jones.)

Direct Examination

The Witness: This concerns the transfers of the Union Trusteed Funds, Inc.—

The Court: Can't you proceed by question and answer? Isn't your co-counsel familiar with these matters so he can question you?

Mr. Mosher: If the Court please, I am sorry, I am not acquainted with this phase of it. [241]

The Witness: I probated this estate and no one else participated in it.

The Court: Proceed. The other method is preferable.

The Witness: These securities were not transferred in accordance with the agreement between Mr. and Mrs. Sullivan dated November 24, 1943. This fact was not discovered until subsequent to Mr. Sullivan's death. They were forwarded on April 1, 1945, to the First National Bank of New Jersey for transfer. That bank sent them on to the Guarantee Trust Company of New York.

The securities were transferred on May 25, 1945, in accordance with the agreement which is in evidence between Mr. and Mrs. Sullivan and the will of Frank K. Sullivan.

Mr. Barnes: May I interpose a question? This item is identified in the stipulation of facts as Item 5, Paragraph 4 (b)?

The Witness: That is correct. When the certificates were returned to me, one-half of them were in the name of Hattie B. Sullivan alone, and the other half were in the name of Hattie B. Sul-

(Testimony of Philip C. Jones.)

livan as a life tenant under the will of Frank K. Sullivan, with the remainder interest to Floyd K. Sullivan.

Item 8 of Paragraph 4 (b) of the stipulation, the Chicago City Railway First Mortgage Bonds, the same [242] situation concerns these that developed with the Union Trusteed Funds, Inc. They were forwarded on April 11, 1945, to the First National Bank of Chicago for re-registration. New certificates were issued and received on May 8, 1945.

These likewise were issued in accordance with the agreement between Mr. and Mrs. Sullivan on November 24, 1945, and the will of Frank K. Sullivan.

Mr. Barnes: I believe you mean the agreement of November 24, 1943, Mr. Jones.

The Witness: 1943, that is right, Mr. Barnes. In other words, one-half were issued in Mrs. Sullivan's name alone and one-half in her name as life tenant under the will of Frank K. Sullivan.

Items 6 and 7 of Paragraph 4 (b) are the Bonnie Lee Apartments Corporation and the St. Francis Hotel and Apartments Corporation. The testimony already has established that these corporations were in the process of liquidation prior to the dates we are concerned with in this proceeding. I, as the attorney for the estate of Frank K. Sullivan, eventually received the checks on final liquidation covering the cash which was available for distribution. One-half of that was returned in the

(Testimony of Philip C. Jones.)

estate of Frank K. Sullivan and one-half of that was handed over directly to Mrs. Sullivan, in accordance with the agreement of November 24, 1943.

The Court: Does that complete your statement?

The Witness: Yes.

Mr. Barnes: I have one question.

Cross Examination

By Mr. Barnes:

Q. The cash in Items 6 and 7, to which you refer, was issued in checks in whose name?

A. Hattie B. Sullivan, as to half of the liquidating amount, and Hattie B. Sullivan—no, I am in error. The other half was issued in the name of the Frank K. Sullivan Estate.

The Court: And half to Hattie B. Sullivan?

The Witness: That is right. There was an equal division, in accordance with the agreements between the husband and wife, of the cash.

By Mr. Barnes:

Q. Did you testify to the date at which you received those checks?

A. No, I didn't. All that I have in my memorandum on it was that the distribution was made subsequent to his death, and I don't have information as to the exact date. I have one letter——

Mr. Barnes: That is all I think is necessary, so far as I am concerned, Mr. Jones.

The Witness: I neglected, Mr. Barnes, to state, and to your Honor, that the \$50,000.00 in Series G Government [244] Bonds, which are referred to in

(Testimony of Philip C. Jones.)

the agreement between Mr. and Mrs. Sullivan of November 24, 1943, subsequent to his death, were redeemed and one-half of the proceeds returned in his estate and one-half of the proceeds turned over to Mrs. Sullivan.

Mr. Barnes: That is all.

(Witness excused.)

Mr. Barnes: If the Court please, at this point I might request permission to substitute a photostatic copy of the estate tax return in evidence. That is a duplicate original, and I would like to——

The Court: Permission is so given.

Anything further for the Petitioner?

Mr. Jones: We rest, your Honor.

The Court: What says the Respondent?

Mr. Barnes: Respondent rests, your Honor.

The Court: Until January 15, 1948, both sides to brief. Until February 10th for both sides to file reply briefs, if you wish.

(Whereupon, at 2:30 o'clock p.m., Wednesday, December 3, 1947, the hearing in the above-entitled matter was closed.)

[Endorsed]: Filed Dec. 30, 1947. [245]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 12476

ESTATE of FRANK K. SULLIVAN, Deceased,
by FLOYD K. SULLIVAN, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the clerk of the Tax Court of the United
States:

You will please prepare, transmit and deliver to
the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit typewritten copies,
duly certified as correct, of the following docu-
ments and records in the above-entitled cause in
connection with the petition for review heretofore
filed by the petitioner:

1. The docket entries of all proceedings before
the Tax Court.

2. Pleadings before the Tax Court as follows:

(a) Petition

(b) Answer. [303]

3. The written stipulation of facts entered into
between petitioner and respondent and all exhibits
attached thereto.

4. The findings of fact and opinion of the Tax
Court.

5. The decision of the Tax Court.
6. The petition for review.
7. The notice of filing petition for review.
8. The official transcript of oral testimony.
9. This designation of contents of record on review.

Dated July 22, 1948.

/s/ PHILIP C. JONES,

/s/ ALBERT MOSHER,

Attorneys for Petitioner.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 2, 1948.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 304, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 17th day of August, 1948.

(Seal)

/s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 12027. United States Court of Appeals for the Ninth Circuit. Estate of Frank K. Sullivan, deceased, by Floyd K. Sullivan, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed August 23, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12027

ESTATE OF FRANK K. SULLIVAN, Deceased,
By FLOYD K. SULLIVAN, Executor,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S STATEMENT OF POINTS TO
BE RELIED UPON ON REVIEW

To the respondent above named and to Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, his attorneys, and to the Honorable Paul P. O'Brien, Clerk of the above entitled Court:

In compliance with the provisions of Subsection (6) of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, you, and each of you, are hereby notified that the petitioner in the above entitled cause intends to rely upon the following points on his appeal in said cause:

1. There is no substantial or legally sufficient evidence to support the Tax Court's findings of fact that the transfer made on November 19, 1943, was made in contemplation of death.

2. There is no substantial or legally sufficient evidence to support the Tax Court's findings of fact that the transfer made on November 24, 1943, was not a bona fide sale for an adequate and full consideration in money or money's worth.

3. The above-designated findings of fact are contrary to the evidence.

4. The Tax Court's findings of fact do not support the decision made and entered by said Court.

5. The decision of the Tax Court is not in accordance with law.

6. The Tax Court erred and abused its discretion in failing to find as a fact that neither the whole nor any part of the properties transferred to Floyd K. Sullivan, the son of the decedent and his wife, Hattie B. Sullivan, were transferred by the decedent in contemplation of his death.

7. The Tax Court erred in holding that the transfers made by decedent to his son were transfers made by the decedent in contemplation of his death.

8. The Tax Court erred in holding that the transfers made by the wife of the decedent, to her son, were includible in the gross estate of the decedent as transfers made by the decedent in contemplation of his death.

9. The Tax Court erred in holding that more than one-half of the value of the securities once owned and held by the decedent and his wife as joint tenants and transferred by the decedent and his wife to their son during the decedent's lifetime, was includible in the decedent's gross estate.

10. The Tax Court erred in holding that the value of the undivided one-half interest of Hattie B. Sullivan, wife of the decedent, in and to the properties owned and held by the decedent and his said wife as tenants in common at the time of his death was includible in the gross estate of the decedent.

11. The Tax Court erred in holding that the joint tenancy properties once owned and held by the decedent and his wife and converted into tenancies in common during the decedent's lifetime, or any part of such properties, were transferred by the decedent.

12. The Tax Court erred in holding that the transfers, if any, involved in the conversion of the joint tenancy properties once owned and held by the decedent and his wife into tenancies in common were transfers in contemplation of the decedent's death.

13. The Tax Court erred in holding that the transfers, if any, made by the decedent and in-

volved in the conversion of the joint tenancy properties once owned and held by the decedent and his wife into tenancies in common were not made as a bona fide sale for an adequate and full consideration in money's worth.

14. The Tax Court erred in holding that the value of the undivided one-half interest of the decedent's wife in and to the properties owned and held by the decedent and his said wife at the time of his death as tenants in common was includible in the decedent's gross estate under and by virtue of the provisions of Section 811(e)(1) of the Internal Revenue Code.

15. The Tax Court erred in failing to hold that the conversion of the joint tenancy properties once owned and held by the decedent and his wife into tenancies in common during the decedent's lifetime was not a transfer made by the decedent in contemplation of his death or otherwise.

16. The Tax Court erred in failing to hold that the transfers, if any, made by the decedent and involved in the conversion of the joint tenancy properties once owned and held by the decedent and his wife into tenancies in common were made as a bona fide sale for an adequate and full consideration in money's worth.

17. The Tax Court erred in holding that the value of the properties, exclusive of the United States Savings Bonds, in which the decedent owned and held an interest at the time of his death, was includible in the decedent's gross estate for reasons and upon grounds which were not set forth in the Notice of Deficiency.

18. The Tax Court erred in failing to give recognition to the laws of the State of California in determining the effect of the transactions whereby the joint tenancy properties once owned and held by the decedent and his wife were converted into tenancies in common, and in determining the nature and extent of the property interests of the decedent in said properties at the time of his death.

19. The Tax Court erred in failing to find as a fact and to hold that the respondent was and is estopped and precluded by the provisions of and omissions from his Notice of Deficiency, from assessing a deficiency based upon his inclusion in the decedent's gross estate, under Section 811(e) of the Internal Revenue Code, of the value of the properties, exclusive of United States Savings Bonds, in which the decedent owned and held an interest at the time of his death.

20. The petitioner fully sustained and satisfied any and all of the requirements of law and rules of court relating to the burden of proof resting upon him in the Tax Court.

Dated at Los Angeles, California, August 27, 1948.

PHILIP C. JONES,
ALBERT MOSHER,

By /s/ ALBERT MOSHER,
Attorneys for Petitioner.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed August 28, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF CON-
TENTS OF RECORD NECESSARY FOR
CONSIDERATION ON REVIEW AND FOR
PRINTING

The petitioner deems the following portions of the record necessary for consideration of the questions presented on review and designates the same for printing in accordance with the provisions of Rule 19 (6) of Rules, Circuit Court of Appeals, Ninth Circuit.

1. Page 1—Docket entries.
2. Pages 2 to 30—Petition.
3. Pages 30 to 33—Answer.
4. Pages 33 to 109—Stipulation of Facts and Exhibits 1-A through 10-J inclusive. Omit Exhibit 11-K (Death Certificate of Frank K. Sullivan).
5. Pages 109 to 130—Findings of Fact and Opinion, including title of court and cause.
6. Page 130—Decision, including title of court and cause.
7. Pages 131 to 140—Petition for Review and proof of service.
8. Pages 140 to 246—Transcript of Testimony. (Omit therefrom the opening statements on behalf of petitioner and respondent commencing on page 142 and ending on page 146.)

9. Omit joint Exhibit 12-L—Pages 246 to 295.

10. Omit all of Exhibit 13—Pages 295 to 302.

11. Pages 303 to 305—Petitioner's Designation of Contents of Record on Review and proof of service (Tax Court).

12. Petitioner's Designation of Record for Printing (Circuit Court).

13. Petitioner's Statement of Points to be Relied upon on Review.

14. Certificate and seal of Clerk of Tax Court.

Dated at Los Angeles, California, this 27th day of August, 1948.

PHILIP C. JONES,
ALBERT MOSHER,

By /s/ ALBERT MOSHER,
Attorneys for Petitioner.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed August 28, 1948. Paul P. O'Brien, Clerk.



No. 12027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF FRANK K. SULLIVAN, Deceased, by FLOYD K.
SULLIVAN, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

PHILIP C. JONES and

ALBERT MOSHER, .

1075 Subway Terminal Building, Los Angeles 13,

Attorneys for Petitioner.

FILED

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No. 12027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF FRANK K. SULLIVAN, Deceased, by FLOYD K.
SULLIVAN, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

PRELIMINARY STATEMENT.

The holdings and decision of the Tax Court in this case, if permitted to stand, would make new law which would not only work a severe injustice upon petitioner, but would provide a most unfortunate precedent not only in cases involving similar facts but in other situations. Already the Tax Court has seized upon its own opinion in this case as justifying the imposition of estate taxes where California community property was converted by spouses into tenancy in common property, *Estate of Edwin W. Rickenberg, Deceased*, (July 7, 1948) 11 T. C.—No. 1, and further extensions of the doctrines announced in the case now under review may be expected if the action of

the Tax Court should be sustained. In such event countless estates would be adversely affected, and opinions and concepts long held and acted upon by attorneys and other tax authorities after years of conscientious and capable study would be proved erroneous. The importance of the case can hardly be overestimated.

Apart from procedural statutes, only three sections of the Internal Revenue Code are involved, and these are printed in full in the appendix to this brief.

JURISDICTION.

Jurisdiction of Court of Appeals.

This is a proceeding instituted by the taxpayer (petitioner above-named) for review of a decision of The Tax Court of the United States.

Jurisdiction is conferred upon the Court of Appeals by the provisions of Sections 1141(a) and 1142 of the Internal Revenue Code. (26 U. S. C. A. Secs. 1141(a), 1142.)

The decision of the Tax Court was rendered on May 27, 1948. [Tr. 115, 2.] A petition for review of said decision, prepared and signed in accordance with the provisions of Rule 30 of the Rules of the above-entitled Court of Appeals, was filed with the Clerk of the Tax Court on August 2, 1948. [Tr. 116, 2.] A copy of said petition, with notice thereof, was duly served upon the Commissioner of Internal Revenue, respondent herein, as required by said Rule 30, and proof of such service was filed with the Clerk of the Tax Court on August 2, 1948. [Tr. 122, 2.] Thereafter, the Clerk of the Tax Court transmitted a typewritten copy of the record on review to the Clerk of the above-entitled Court, who re-

ceived and filed said record on August 23, 1948. [Tr. 210-211.] As authorized by said Rule 30, the record was prepared in accordance with the provisions of Rule 75 of the Federal Rules of Civil Procedure. (See: 28 U. S. C. A. foll. Sec. 723c, Rule 75.)

The return of the tax in respect of which the asserted liability arises was made to the Collector of Internal Revenue for the Sixth District of California. [Tr. 28, 91-92. See: 26 U. S. C. A. Sec. 1141(b)(1).]

Jurisdiction of the Tax Court.

Jurisdiction of the Tax Court was conferred by Sections 1101 and 871(a)(1) of the Internal Revenue Code. (26 U. S. C. A., Secs. 1101, 871(a)(1).)

The proceeding in the Tax Court was initiated by the filing, by the taxpayer, petitioner herein, of a petition for redetermination of a federal estate tax deficiency determined by the Commissioner of Internal Revenue. [Tr. 3, 1. See: 26 U. S. C. A., Sec. 871(a)(1).] Said petition was signed and verified as prescribed by Rule 6 of the Rules of Practice before The Tax Court of the United States, and contained proper allegations showing jurisdiction of the Tax Court, and other matters as required by said Rule 6. [Tr. 3.] A copy of the Commissioner's notice of deficiency was appended to said petition as required by said Rule. [Tr. 15.] Said petition, together with the answer of the Commissioner, constituted the only pleadings filed with the Tax Court in this matter. [Tr. 3, 25.] At the hearing before the Tax Court a written stipulation was filed wherein and whereby the parties agreed upon a portion of the facts involved in the proceeding. [Tr. 27, 2.] Subsequent to said hearing, the Tax Court made and filed its findings of fact and

opinion and rendered its decision as aforesaid. [Tr. 91, 115, 2.] The facts showing the jurisdiction of the Tax Court appear from the admitted averments of the petition, from said stipulation and from said findings of fact. It was alleged in paragraphs 1, 2 and 3 of the petition, in substance, and was admitted by the answer that the petitioner was an individual residing at Los Angeles, California; that he was formerly the executor of the Estate of Frank K. Sullivan, Deceased, and was the person to whom all the communications in respect to the estate of said deceased were directed by the Treasury Department; that decedent died on January 9, 1944; that probate of said estate had been concluded; that petitioner was discharged as such executor on June 4, 1945; that all of said estate had been distributed by decree of the Superior Court of the State of California in and for the County of Los Angeles; that the estate tax return (Form 706) for said estate was filed with the Collector for the Sixth District of California; that the applicable valuation date was the date of death of decedent; that the notice of deficiency was mailed to petitioner on August 15, 1946; and that the taxes in question were the estate taxes on said estate, and in particular the Commissioner's determination of said taxes which, according to said notice, disclosed a deficiency of \$18,963.17 without application of the credit for state inheritance tax purposes in the amount of \$460.75. [Tr. 3-4, 25.]

At the time of the death of Frank K. Sullivan (hereinafter sometimes called decedent) he was domiciled and resided in the State of California. [Tr. 33, 92.]

According to the federal estate tax return for said estate, the value of the gross estate of the decedent for basic tax purposes was \$63,440.55, and allowable deductions for both basic estate tax and additional estate tax amounted to \$105,728.22, resulting in an absence of estate tax liability. [Tr. 18, 92.]

Pursuant to the decree of distribution in said estate a life interest in the assets of the estate was distributed to Hattie B. Sullivan, widow of decedent, and the remainder interest in the estate was distributed to said Floyd K. Sullivan. Mrs. Sullivan died December 18, 1946, and thereupon said Floyd K. Sullivan became the owner of all of said assets. [Tr. 28, 100, 101.]

On November 12, 1947, said Floyd K. Sullivan, acting on behalf of decedent's estate, filed with The Tax Court of the United States a petition for redetermination of the asserted deficiency. [Tr. 3, 1.]

On December 2 and 3, 1947, a hearing was had on said petition before the Tax Court, the Honorable R. L. Disney, Judge Presiding. [Tr. 2.] The Court ordered and determined in its decision that there was a deficiency of \$18,963.17 in estate tax, and the decision was entered on May 27, 1948. [Tr. 115, 2.] It is this decision which petitioner requests the Honorable Court of Appeals to review.

STATEMENT OF CASE, QUESTIONS INVOLVED AND MANNER IN WHICH QUESTIONS RAISED.

Statement of Case.

Frank K. Sullivan was born April 6, 1866, and died testate on January 9, 1944. He and Hattie B. Sullivan were married in Minneapolis, Minnesota, April 6, 1892, and remained husband and wife until the time of Mr. Sullivan's death. Mrs. Sullivan was born May 24, 1867. She survived her husband and died December 18, 1946. At the time of decedent's death and for about twenty-two years prior thereto decedent and his wife resided and were domiciled in California. Their California domicile was established in 1922. For many years before such domicile was established decedent and his wife resided and were domiciled in Minnesota. [Tr. 3, 6, 25, 26, 28, 33, 34, 65-67, 91, 92.]

For a long time before the spouses established their home in California, decedent owned and conducted a retail coal business in Minnesota. In 1918 he sold said business and received the sum of \$100,000 therefor. Thereafter for all intents and purposes he retired from active business and invested the proceeds of the sale of said business in apartment houses and income property and in mortgages and trust deeds with various Los Angeles firms. During his residence in California he was not employed and he engaged in no business except that of looking after his investments. [Tr. 6, 7, 26, 33, 34, 92.] Petitioner concedes that the original source of all of the property involved here was the proceeds of the sale of decedent's coal business, and that under the laws of the State of Minnesota, decedent's wife had no interest in such proceeds. [See Tr. 113.]

It was conceded by both parties to the proceeding before the Tax Court and in effect stipulated, that none of the properties involved constituted community property of the spouses. [Tr. 32-33, 113-114.] Under the laws of the State of California, none of the property could have been owned or held by the spouses as tenants by the entirety.

Swan v. Walden (1909), 156 Cal. 195, 133 Pac. 931.

Values of all property involved in the case were agreed upon by written stipulation filed in the Tax Court. [Tr. 29.]

On and immediately prior to November 19, 1943, decedent owned or had an interest in certain bearer bonds, and certain shares of stock which, on said date, were given by the decedent and his wife to Floyd K. Sullivan, their 44-year old son. The aggregate value of these securities was \$33,526.54, as of the date of decedent's death. At the time of the gifts the following securities, having the values shown were held of record in the name of decedent alone [Tr. 29-30, 32-33, 38-39, 40-42, 93, 95]:

<i>Description</i>	<i>Value</i>
2,500 shares Harris Mfg. Co.	\$4,687.50
125 shares Pacific-American Investors preferred stock	2,312.50
1,150 shares Pacific-American Investors, Inc., common stock	2,156.25
100 shares Pacific Intermountain Express Co. preferred stock	1,000.00
10 shares W. B. Coon Co. preferred stock	1,050.00
25 shares Bank of America common stock	1,134.38
Total	<hr/> \$12,340.63

It was alleged in the petition for redetermination of the asserted deficiency and was denied in the answer that, at the time of the gifts to their son, decedent and his wife owned and held all of the donated securities as joint tenants, in equal undivided shares and interests constituting separate property of the respective donors. [Tr. 5, 25-27.] It was established by stipulation filed in the Tax Court that all of said securities except those standing in the name of the decedent alone, were owned and held by the decedent and his wife as joint tenants at and immediately prior to the time of the gifts, and that the securities then standing in the name of the decedent alone were either jointly owned and held by him and his wife at said time or were then owned by him only. [Tr. 32-33.] It was and is, therefore, an undisputed fact in the case that donated securities of the aggregate value of at least \$21,185.91 were owned by the donors as joint tenants at and immediately before the time the gifts were made. The Tax Court failed to make any finding of fact upon the issue as to the ownership of any of the securities at the time of the gifts, and although the stipulation settled the question as to all of the donated property except securities aggregating \$12,340.63 standing in the name of the decedent alone, the findings are silent as to the ownership of the last-mentioned securities at said time. It was, however, established by undisputed evidence that all of the donated securities, including those held in the name of decedent alone, were owned by the spouses as joint tenants at and immediately prior to the time the gifts were made. [Tr. 19, 125-126.]

The Tax Court also failed to make findings of fact that only an undivided one-half interest in the joint tenancy securities given to Floyd K. Sullivan was transferred by

decedent, and that the value of such interest did not exceed \$16,763.27 (or in any event did not exceed \$22,933.59), and that none of the property transferred by either spouse to their son was transferred in contemplation of decedent's death.

No part of the value of any of the donated securities was included by the executor, in the estate tax return, as a part of the value of decedent's gross estate. [Tr. 32, 96.]

In his notice of deficiency respondent included the entire value, to wit, \$33,526.54, of the donated securities, in decedent's gross estate as property transferred by the decedent in contemplation of his death under the provisions of Internal Revenue Code, Section 811(c). [Tr. 17, 29-30, 96.]

The Tax Court found as a fact that the transfers made to Floyd K. Sullivan were made in contemplation of death, and held the entire value of the donated securities (\$33,526.54) includible in decedent's gross estate and that petitioner had failed to establish error in the respondent's determination with respect to said transfers. [Tr. 101, 103-105, 107, 114.] The Court then, by its decision, confirmed the asserted deficiency. [Tr. 115.] Peculiarly the Court ultimately justified the inclusion of the entire value of the gifts in the gross estate not on the statutory ground asserted and relied on by respondent, namely, Internal Revenue Code, Section 811(c), but on the ground the property was so includible as jointly held property under Internal Revenue Code, Section 811(e)(1). [Tr. 112, 114.]

Petitioner contends, with reference to the gifts and transfers to Floyd K. Sullivan that: The findings of fact made by the Tax Court are contrary to the evidence as

stated in paragraph (1) of the Specification of Errors contained herein, and are deficient in the particulars stated in each of paragraphs (2) through (8), of said Specification of Errors; the conclusions and holdings of the Tax Court as set forth in its opinion were and are erroneous and deficient as stated in each of paragraphs (9) through (13) of said Specification of Errors; and the decision is not in accordance with and is contrary to law as stated in each of paragraphs (13), (14), (35) and (36) of said Specification of Errors. Petitioner's contentions in this connection are summarized in the statement of Questions Involved, hereinafter set forth. Petitioner contends that each and all of said questions should be answered in the affirmative.

On November 24, 1943, decedent and his wife, acting upon the suggestions of their attorney, made and entered into a written agreement affecting their property. A copy of the agreement was attached to the petition for redetermination of the asserted deficiency, and the original thereof was introduced in evidence in the hearing before the Tax Court. [Tr. 19, 188-189.] It was recited in said agreement, among other things, that the parties had, during their married life, accumulated certain real and personal properties, substantially all of which were then owned by them as joint tenants and that they desired to terminate all of such joint tenancies and divide all of said property between them to the end that each would own approximately one-half thereof as his or her separate property free and clear of all rights and claims of the other party. It was mutually agreed, in substance, that from and after the date of said agreement all of the real and personal property owned by the parties, whether then held in joint tenancy or owned by either of the parties in his or her name, should be owned by each of them as follows:

An undivided one-half interest therein should be the separate property of decedent and the remaining undivided one-half interest therein should be the separate property of his wife. By the provisions of the agreement each party assigned and transferred to the other party all of his or her right, title and interest in and to an undivided one-half interest in said properties. [Tr. 19-20.]

Included in the property affected by said agreement were four parcels of California real property, five promissory notes secured by deeds of trust on California real estate, six United States Savings Bonds, certain railway bonds and certain shares of the capital stock of three corporations. [Tr. 20-21, 97-98.] Certain furniture, fixtures and household goods, and a joint bank account held by the spouses were also affected by the agreement but not specifically referred to therein. [Tr. 20-24, 31-33, 98.]

At the time of the execution of said agreement, all of the property of decedent and his wife, and each of them, with the possible exception of one parcel of real property, was owned and held by decedent and his wife as joint tenants. Title to one parcel of real property (having a value of \$1,500) stood in the name of decedent only. Decedent and his wife continued to own and hold all of said real property, bonds, promissory notes, shares of stock and furniture, fixtures and household goods until decedent's death. [Tr. 30-31, 32-33, 35, 99.]

Concurrently with the execution of the agreement decedent and his wife, as grantors, executed deeds purporting to convey the three parcels of real property standing in their names as joint tenants, to decedent, and decedent at the same time executed deeds purporting to convey an undivided one-half interest in each of said parcels to his wife. On the same day decedent executed a deed purport-

ing to convey an undivided one-half interest in the parcel of real property standing in his name alone, to his wife. At the same time assignments of the deeds of trust securing the five promissory notes were executed by decedent and his wife in favor of decedent, and assignments of an undivided one-half interest in each deed of trust was executed by decedent in favor of his wife. All of said deeds and assignments were recorded during the lifetime of decedent. The deeds and assignments were made for the purpose of effecting changes in the record title in conformity with the agreement. [Tr. 35-37, 31, 20-21, 68-90, 98.] Certain of the shares and bonds were not transferred of record until after decedent's death, and no record transfer was made of certain other shares or of the United States Savings Bonds, for reasons explained in the record. [Tr. 37, 22, 98-99.]

On December 20, 1943, \$2,400 was withdrawn by decedent's wife from the bank account then standing in the names of the spouses, and deposited in her name in another bank. It was stipulated, in effect, that the account from which such withdrawal was made was in existence at and immediately prior to the time of the execution of the agreement dated November 24, 1943, and that decedent and his wife then owned and held the account as joint tenants. [Tr. 29, 32-33, 100.]

In the estate tax return the executor omitted from the decedent's gross estate one-half of the value of the bonds (including the United States Savings Bonds), one-half the value of the real property, shares of stock, promissory notes and furniture, fixtures and household goods covered by the agreement and the entire amount of the moneys withdrawn from the bank account by decedent's wife on December 20, 1943. [Tr. 99-100.]

In his notice of deficiency respondent reduced the returned value of the stocks and bonds included in the return by the amount of \$140.20 and increased the deductions allowable by \$64.20, thereby diminishing the value of the gross estate by \$204.40. He then included in the gross estate, not only the entire value of the securities transferred to Floyd K. Sullivan (\$33,526.54), but one-half of the adjusted value of the United States Savings Bonds (such one-half amounting to \$25,013.80), one-half the value of the rest of the property covered by the agreement not including the bank account (such one-half amounting to \$35,348.75), and the entire value (\$2,400) of the moneys withdrawn from the bank account by decedent's wife prior to his death. [Tr. 29-32, 96, 99-100.] It appears from the notice of deficiency that these additions were made on the grounds that the gifts to Floyd K. Sullivan and the conversion of the properties of the spouses into tenancies in common by the agreement, and the withdrawal of the funds from the bank account were transfers in contemplation of death within Internal Revenue Code, Section 811(c), and that the value of the United States Savings Bonds was includible in the gross estate under said section and also as jointly held property under Section 811(e)(1) of the Code. [Tr. 18.]

Respondent determined that a deficiency of \$18,502.42 existed all of which resulted from the foregoing additions to the value of the gross estate. [Tr. 28-29, 16-18, 91.]

It was alleged in substance in the petition for redetermination of the asserted deficiency, and denied in the answer, that all property acquired by decedent and his wife after the coal business was sold, was originally acquired and held by them as joint tenants with right of survivorship, and was thereafter owned and held by them as such

joint tenants until partitioned, divided and commuted, by the agreement of November 24, 1943, into property owned and held by them as tenants in common, and that, at the time of decedent's death, all of the property in which decedent or his wife had an interest was then owned and held by them as tenants in common and not as joint tenants, in equal undivided shares and interests, such shares and interests of decedent's wife then being her sole and separate property. [Tr. 7, 4-5, 8-9, 25-26.]

The Tax Court found as a fact, in accordance with the stipulation filed at the hearing, that prior to the execution of the agreement, all of the real estate (except the parcel of the value of \$1,500 held in decedent's name only), and the notes, bonds, stocks, furniture and fixtures were held in joint tenancy by the decedent and his wife. [Tr. 32-33, 29, 99.] It was stipulated, in substance and effect, that said parcel of real property held in the decedent's name alone was either owned by decedent and his wife as joint tenants or by decedent only, at and immediately prior to the time of the execution of the agreement. [Tr. 32-33.] The Tax Court's "Findings of Fact" contained no specific finding upon the issue as to the ownership of said parcel at said time; but the Court held in its opinion that under the agreement decedent "received only a half interest by tenancy in common," and apparently recognized and found it to be a fact that the parcel of real property last-mentioned, like all of the other property affected by the agreement, was joint tenancy property at and immediately prior to the time the agreement was executed. [Tr. 91-101, 109.] The Court assumed in its findings of fact and in its opinion, but did not specifically find or hold, that the conversion of the joint tenancy properties into tenancy in common properties involved a transfer; and the Court

found as a fact that such transfer was made in contemplation of death and was not a bona fide sale for an adequate and full consideration in money or money's worth. [Tr. 91-101.] The Court did not determine or state in its findings of fact the amount, if any, by which the fair market value of the property, if any, transferred by decedent by or pursuant to the agreement, exceeded the value of the consideration received by decedent therefor, but the holding of the Court with reference to the properties involved, including the bank account and excluding the securities given to Floyd K. Sullivan appears to rest upon the premise that all or at least one-half of said properties was transferred by decedent to his wife and that he received nothing of value as consideration therefor. The Court made no determination in its "Findings of Fact" of the issue whether the property owned or held by decedent and his wife or either of them was or was not owned by them as tenants in common at the date of decedent's death; but as before stated, the Court in its opinion found as a fact and held that at the time of decedent's death his only interest in such property was that of a tenant in common. [Tr. 91-101, 109.] The Court held the entire value of the properties affected by the agreement of November 24, 1943, including, among other things, the United States Savings Bonds, together with the \$2,400 withdrawn by decedent's wife from the bank account and deposited to her own credit during decedent's lifetime, includible in decedent's gross estate under Internal Revenue Code, Section 811(e)(1), which relates exclusively to joint tenancy property held by decedent and another person at the time of decedent's death and to property then held by spouses as tenants by the entirety. [Tr. 105-114.] The Court apparently reached this conclusion by recognizing local law making decedent and his wife

tenants in common, by then holding that a transfer is one made in contemplation of death solely because the effect thereof would be to minimize federal estate taxes [Tr. 109], by then giving to Internal Revenue Code, Section 811(c), relating to transfers in contemplation of death the effect *not of imposing a tax* but of *avoiding* a transaction sanctioned by local law, and by then invoking Section 811(e)(1) of the Code as authority for imposing the tax on the interests of both spouses as tenants in common despite the fact that at the time decedent's death he held no property as a joint tenant or as a tenant by the entirety. [Tr. 105-114.]

The Tax Court held petitioner had failed to establish error on the part of respondent in his determination of the asserted deficiency and in its decision then sustained such determination in its entirety. [Tr. 114, 115.]

Petitioner contends with reference to the transactions other than the gifts to Floyd K. Sullivan that: The findings of fact made by the Tax Court are contrary to the evidence as stated in paragraph (1) of the Specification of Errors contained herein and are deficient in the particulars stated in each of paragraphs (15) through (20), and (30) and (34) of said Specification of Errors; the conclusions and holdings of the Tax Court as set forth in its opinion were and are erroneous and deficient as stated in each of paragraphs (21) through (26), and (29) and (31) of said Specification of Errors; and the decision is not in accordance with and is contrary to law as stated in paragraphs (27), (28), (35) and (36) of said Specification of Errors. Petitioner's contentions in this connection are summarized in the statement of Questions Involved, hereinafter set forth, to each of which petitioner contends an affirmative answer should be given.

Questions Involved and Manner in Which Questions Raised.

The questions here involved arise upon a petition by the taxpayer to review a decision of the Tax Court of the United States.

The questions are as follows:

(1) Were the findings of fact to the effect that the transfers made by decedent and by his wife to their son were made in contemplation of decedents' death, unsupported by the evidence?

(2) Did the Tax Court err in failing to make findings of fact as follows: (a) a finding upon the issue whether the securities, aggregating \$12,340.63 in value, standing in the name of decedent alone at and immediately prior to the time of the gifts to his son were then owned by him alone or by him and his wife as joint tenants; (b) a finding that such securities were then owned by decedent and his wife as joint tenants; (c) a finding that only an undivided one-half interest in the securities owned by the spouses as joint tenants and thereafter transferred to their son was transferred by decedent; (d) a finding that the value of the property interests transferred by decedent to his son did not exceed \$16,763.27, or in any event did not exceed \$22,933.59; (e) a finding that neither the whole nor any part of the property interests transferred by decedent to his son was transferred in contemplation of decedent's death; and (f) a finding that neither the whole nor any part of the property interests transferred by decedent's wife to her son was transferred in contemplation of decedent's death?

(3) Did the Tax Court err in the following holdings: (a) the holding that the entire value (\$33,526.54) or any part thereof, of the securities given to the son of decedent, was includible in the value of decedent's gross estate by virtue of the provisions of Internal Revenue Code, Section 811(c) relating to transfers in contemplation of death; or under Internal Revenue Code, Section 811(e)(1), or otherwise; (b) the holding that the value, or any part thereof, of the interests transferred by decedent's wife to her son was includible in the value of decedent's gross estate under or by virtue of either of said sections, or otherwise; and (c) the holding that petitioner failed to establish error in respondent's action in treating said transfers as transfers made in contemplation of death?

(4) Is the decision in conflict with law as follows: (a) to the extent that the adjudicated deficiency was based upon the inclusion, in the value of decedent's gross estate, of the entire value (\$33,526.54), or any part thereof, of the securities given to his son; and (b) to the extent that such deficiency was based upon the inclusion, in the value of decedent's gross estate, of the value of the interest of decedent's wife in the joint tenancy securities given to her son?

(5) Were the findings of fact to the effect that the "transfer" made on November 24, 1943, was made in contemplation of death and was not a bona fide sale for an adequate and full consideration in money or money's worth unsupported by the evidence?

(6) Did the Tax Court err in failing to make findings of fact as follows: (a) a specific finding upon the issue whether the parcel of real property of the value of \$1,500 standing in decedent's name alone at and immediately prior to the time of the execution of the agreement of November 24, 1943, was then owned by decedent alone or by him and his wife as joint tenants; (c) a finding that no property or any interest therein affected by said agreement was transferred by decedent to his wife; (d) a finding as to the amount, if any, by which the fair market value of the property, if any, transferred by decedent to his wife exceeded the value of the consideration received by him therefor; (e) a finding that said last-mentioned amount did not exceed \$750; and (f) a finding that at the date of decedent's death all of the property owned or held by him and his wife and each of them was owned by them as tenants in common in equal undivided shares and interests?

(7) Did the Tax Court err in the following holdings: (a) that the value (\$25,013.80) of the interest of decedent's wife in the United States Savings Bonds, or any part of such value, was includible in the value of decedent's gross estate; (b) the holding that the value (\$35,-348.75) of the interest of decedent's wife in the remainder of the property affected by the agreement of November 24, 1943, exclusive of moneys withdrawn from the bank account, or any part of such value, was includible in the value of said estate; (c) the holding that the joint tenancy properties owned by decedent and his wife

and thereafter converted into tenancy in common properties, or any part of such properties, were transferred by decedent; (d) the holding that the transfers, if any, from decedent to his wife of an undivided one-half interest in said real property was a transfer in contemplation of decedent's death; and (e) the holding that petitioner failed to establish error in respondent's determination with respect to the transfers, if any, to decedent's wife?

(8) Was the holding that the value of the properties, exclusive of those given to decedent's son, was includible in the value of decedent's gross estate under Internal Revenue Code, Section 811(e)(1), unsupported by the findings of fact?

(9) Is the decision unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of his wife in the properties owned by her and decedent as tenants in common at the time of his death?

(10) Is the decision in conflict with law to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of decedent's wife in the properties owned by her and decedent as tenants in common at the time of his death?

(11) Did the Tax Court err in failing to give recognition to the laws of the State of California in determining

the effect of the agreement of November 24, 1943, and the acts of the spouses done pursuant thereto?

(12) Did the Tax Court err in holding that all or any part of the \$2,400 withdrawn by decedent's wife from the bank account on December 20, 1943, was includible in the value of decedent's gross estate?

(13) Is the decision unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the moneys in excess of \$1,200 withdrawn by decedent's wife from the bank account on December 20, 1943?

(14) Is the decision in conflict with law to the extent that the adjudicated deficiency is based upon the inclusion in the value of decedent's gross estate of the moneys withdrawn by decedent's wife from the bank account on December 20, 1943?

(15) Did the Tax Court err in failing to find as a fact and to hold that respondent was and is estopped and precluded by the provisions of and omissions from his notice of deficiency from assessing any deficiency based upon his inclusion in the value of decedent's gross estate under Internal Revenue Code Section 811(e) of the value of any properties involved exclusive of United States Savings Bonds?

(16) Did the Tax Court err in ordering and deciding in its decision that there is a deficiency of \$18,963.17, or any other sum or amount, in estate tax?

SPECIFICATION OF ERRORS.

The petitioner assigns as error the following acts and omissions of the Tax Court:

(1) The following findings of fact and each and every part thereof are unsupported by and contrary to the evidence [Tr. 101]:

“The transfers made on November 19, 1943, and November 24, 1943, were made in contemplation of death and the latter was not a bona fide sale for an adequate and full consideration in money or money's worth.”

(2) The failure to make a finding of fact upon the issue concerning the ownership of the securities standing in the name of the decedent alone at and immediately prior to the time of the gifts to Floyd K. Sullivan.

(3) The failure to find as a fact that all of the securities, aggregating \$12,340.63 in value, given to Floyd K. Sullivan, and standing in the name of decedent alone at and immediately prior to the time of the gifts, were then owned by decedent and his wife as joint tenants.

(4) The failure to find as a fact that only an undivided one-half interest in the securities owned and held by decedent and his wife as joint tenants and thereafter transferred to Floyd K. Sullivan was transferred by decedent.

(5) The failure to find as a fact that the value of the property interests transferred by decedent to Floyd K. Sullivan did not exceed \$16,763.27.

(6) The failure to find as a fact that the value of the property interests transferred by decedent to Floyd K. Sullivan did not exceed \$22,933.59.

(7) The failure to find as a fact that neither the whole nor any part of the property interests transferred to Floyd K. Sullivan by decedent was transferred in contemplation of decedent's death.

(8) The failure to find as a fact that neither the whole nor any part of the property interests transferred to Floyd K. Sullivan by the wife of decedent was transferred in contemplation of decedent's death.

(9) The holding that the value of the property interests transferred by decedent to Floyd K. Sullivan was \$33,526.54 or any sum or amount in excess of \$16,763.27.

(10) The holding that the entire value (\$33,526.54), or any part of the value of the securities given to Floyd K. Sullivan, was includible in the value of the gross estate of decedent by virtue of the provisions of Internal Revenue Code Section 811(c) relating to transfers in contemplation of death, or under Internal Revenue Code Section 811(e)(1), or otherwise.

(11) The holding that the value, or any part thereof, of the interests transferred by decedent's wife to Floyd K. Sullivan was includible in the value of decedent's gross estate by virtue of the provisions of Internal Revenue Code Section 811(c) relating to transfers in contemplation of death, or under Internal Revenue Code Section 811(e)(1), or otherwise.

(12) The holding that petitioner failed to establish error in the action of respondent in treating the transfers to Floyd K. Sullivan as having been made in contemplation of death.

(13) The decision is not in accordance with and is in conflict with law to the extent that the adjudicated de-

iciency was based upon the inclusion in the value of decedent's gross estate of the entire value (\$33,526.54), or any part thereof, of the donated securities.

(14) The decision is not in accordance with and is in conflict with law to the extent that the adjudicated deficiency was based upon the inclusion, in the value of decedent's gross estate, of the value of the interest of decedent's wife in the joint tenancy securities given to her son.

(15) The failure to make a specific finding of fact upon the issue whether the parcel of real property (of the value of \$1,500), standing in decedent's name alone at and immediately prior to the time of the execution of the agreement of November 24, 1943, was then owned by decedent alone or by decedent and his wife as joint tenants.

(16) The failure specifically to find as a fact that at and immediately prior to the time of the execution of the agreement dated November 24, 1943, the parcel of real property which was held in decedent's name alone was then owned by him and his wife as joint tenants.

(17) The failure to find as a fact that no property or any interest therein affected by the agreement of November 24, 1943, was transferred by decedent to his wife.

(18) The failure to make a finding of fact as to the amount, if any, by which the fair market value of the property, if any, transferred by decedent to his wife exceeded the value of the consideration received by decedent therefor.

(19) The failure to find as a fact that the amount by which the fair market value of the property, if any, transferred by decedent by or pursuant to the agreement

dated November 24, 1943, exceeded the value of the consideration therefor was not in excess of the sum of \$750.

(20) The failure to find as a fact that at the date of decedent's death all of the property owned or held by him and his wife and each of them was owned by them as tenants in common in equal undivided shares and interests.

(21) The holding that the value, to-wit, \$25,013.80, of the undivided one-half interest of decedent's wife in and to the United States Savings Bonds, owned by decedent and his wife as tenants in common at the time of his death, or any part of such value, was includible in the value of decedent's gross estate.

(22) The holding that the value, to-wit, \$35,348.75, of the undivided one-half interest of decedent's wife in and to the property affected by the agreement of November 24, 1943, exclusive of the United States Savings Bonds, and of the moneys withdrawn from the bank account, owned by decedent and his wife as tenants in common at the time of decedent's death, or any part of such value, was includible in the value of decedent's gross estate.

(23) The holding that the joint tenancy properties owned by decedent and his wife and thereafter converted by them into tenancy in common properties, or any part of such properties, were transferred by decedent.

(24) The holding that the transfer, if any, from decedent to his wife of an undivided one-half interest in the parcel of real property standing in decedent's name alone at and immediately prior to the time of the execution of the agreement dated November 24, 1943, was a transfer in contemplation of decedent's death.

(25) The holding that petitioner failed to establish error in respondent's determination with respect to the transfers (if any) to decedent's wife.

(26) The holding that the value of the properties involved, exclusive of those given to Floyd K. Sullivan, was includible in the value of decedent's gross estate under Internal Revenue Code Section 811(e)(1) is unsupported by the findings of fact.

(27) The decision is unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of his wife in the properties owned by her and decedent as tenants in common at the time of his death.

(28) The decision is not in accordance with and is contrary to law to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of his wife in the properties owned by her and decedent as tenants in common at the time of his death.

(29) The failure to give recognition to the laws of the State of California in determining the effect of the transactions whereby the properties once owned and held by decedent and his wife and each of them were converted into tenancy in common properties and in determining the nature and extent of the property interests of decedent in said properties at the time of his death.

(30) The failure to make a finding of fact to the effect that at the time of his death decedent was not the owner of and had no interest as a joint tenant in any of the

moneys withdrawn from the bank account by his wife on December 20, 1943.

(31) The holding that the entire value (\$2,400) or any part of the value of the moneys withdrawn by decedent's wife from the bank account on December 20, 1943, was includible in the value of decedent's gross estate.

(32) The decision is unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the amount of moneys in excess of \$1,200 withdrawn by decedent's wife from the bank account on December 20, 1943.

(33) The decision is not in accordance with law to the extent that the adjudicated deficiency is based upon the inclusion in the value of decedent's gross estate of the amount of moneys withdrawn by decedent's wife from the bank account on December 20, 1943.

(34) The failure to find as a fact and to hold that respondent was and is estopped and precluded by the provisions of and omissions from his notice of deficiency from assessing any deficiency based upon his inclusion in the value of decedent's gross estate under Internal Revenue Code Section 811(e) of the value of any properties involved exclusive of United States Savings Bonds.

(35) The decision that there is a deficiency of \$18,963.17 in estate tax.

(36) The decision that there is any deficiency in estate tax.

SUMMARY OF ARGUMENT.

The argument of petitioner is summarized as follows:

- I. Rules of property established by California law and decisions of its courts are binding upon the federal courts and the Tax Court should have given recognition thereto in its determination.
- II. The Tax Court erred in holding that the whole or any part of the value of the securities transferred by decedent and his wife to their son was includible in the value of decedent's gross estate.
 - A. All of the donated securities, aggregating \$33,526.54 in value, were owned by the donors as joint tenants at the time of the gift; the interests of the spouses were equal; each spouse made a gift valued at \$16,763.27 to their son; and neither spouse had any interest in the securities at the time of decedent's death.
 - B. The finding that the transfers to the son were in contemplation of death was unsupported by and contrary to the evidence.
 1. A portion of the interests transferred was transferred by decedent's wife, not by decedent.
 2. The requisite motive was lacking to constitute the transfer by decedent as one in contemplation of his death.
 - C. The findings of fact were deficient in that the Tax Court did not find on the material issue whether the securities aggregating \$12,340.63 in value held in decedent's name alone were

owned by him only or by the spouses as joint tenants. If such a finding is included in the general finding that the transfers were in contemplation of decedent's death, it is contrary to the stipulation of facts and to the evidence. If the evidence warranted a finding that property of a value exceeding \$16,763.27 was transferred by decedent, the value could not have exceeded \$22,933.59, and the Court erred in not so finding. If by construction such a finding was made it does not support the conclusion of law that property of a value of \$33,526.54 was transferred by decedent in contemplation of death.

- D. It is implicit in the findings that neither of the donors held any interest in the donated securities at the time of decedent's death. The findings in this connection do not support the conclusion that any part of the value of the donated securities was includible in the gross estate as jointly held property under I.R.C. 811(e)(1).
- E. The Tax Court erred in holding that petitioner failed to establish error in respondent's action relative to the gifts to the son.
 - 1. The two-year presumption prescribed by I.R.C. Section 811(c) was inapplicable to the gift and transfer made by decedent's wife to her son, because the property did not belong to and was not transferred by decedent.
 - 2. Such presumption was inapplicable to the gift and transfer by decedent to his son because it was not a transfer of a material part of decedent's property.

3. The two-year presumption, if any, was dispelled by the evidence.
4. Under the Tax Court's view the donated property was taxable under I.R.C. Section 811(e)(1) which prescribes no presumption.
5. The general burden of proof requirements were fully met by petitioner by substantial, unimpeached, uncontradicted evidence in which there was no conflict.

F. The decision is in conflict with law to the extent that the adjudicated deficiency was based upon the inclusion of any part of the value of the donated securities in decedent's gross estate.

III. The Tax Court erred in holding that any part of the value in excess of one-half thereof of the properties owned by decedent and his wife at the time of his death was includible in the value of decedent's gross estate.

A. By the agreement of November 24, 1943, all of the properties of decedent and his wife, whether jointly or severally owned, were converted into tenancy in common properties. Nothing in excess of one-half of the value thereof, constituting decedent's interest therein at the time of his death, was includible in his gross estate. Such interest was includible under I.R.C. Section 811(a) only.

- B. By stipulation all of the properties affected by the agreement, valued at \$123,125.10, except one parcel of land valued at \$1,500, were owned by the spouses as joint tenants when the agreement was executed. By stipulation the \$1,500 parcel was then jointly owned or was owned by decedent only.
- C. The findings that the conversion of the joint tenancy properties into tenancy in common property was a transfer by decedent in contemplation of his death and was not a bona fide sale for an adequate and full consideration in money or money's worth were unsupported by and contrary to the evidence.
 - 1. The effect of the agreement upon the joint tenancy properties was to extinguish the rights of survivorship, terminate the joint tenancies and convert the properties into tenancy in common properties by operation of law. No transfer by or to either spouse was involved in such conversion.
 - 2. If any transfer by decedent was involved in such conversion, it was not a transfer in contemplation of death. The requisite motive was lacking. The mere fact the agreement resulted in a diminishment of estate tax liability was not sufficient evidence of such motive; and the agreement was executed solely by reason of suggestions made by the spouses' attorney. Furthermore, the transfer was made solely as a bona fide sale for an adequate and full consideration in money's worth.

- D. The findings of fact were deficient in that the Tax Court did not find on the material issue whether the \$1,500 parcel of land was owned by decedent only or by the spouses as joint tenants when the agreement was executed. The issue was material, for if all of the properties converted into tenancy in common properties were joint tenancy properties no transfer was made by decedent in contemplation of his death for the reasons above-stated; and if decedent alone owned the parcel at the time of the conversion, not more than one-half the value thereof (\$750) could have been includible in decedent's gross estate as a transfer in contemplation of his death. The Tax Court also failed to find as a fact, in accordance with the evidence and the Court's own conclusion of law, that all of the property of the spouses was owned by them as tenants in common at the time of decedent's death.
- E. Only one-half of the value of the United States Savings Bonds was includible in decedent's gross estate.
1. Said bonds, aggregating in value \$50,027.60, were owned by the spouses as joint tenants when the agreement was executed. The interests of the spouses therein were converted into interests of tenants in common despite the fact there was no change in registration until after decedent's death. No interest in said bonds was transferred by decedent in contemplation of his death; if any transfer was made it was a bona fide sale

for an adequate and full consideration in money's worth; and the spouses did not own any of said bonds as joint tenants at the time of his death. The contribution and other provisions of I.R.C. 811(e)(1) were inapplicable. They cannot be retroactively applied by treating I.R.C. Section 811(c) as avoiding rather than a taxing section. The undivided one-half interest of decedent's wife as a tenant in common therein was not includible in decedent's gross estate.

F. Only one-half of the value of the properties, exclusive of the United States Savings Bonds, was includible in decedent's gross estate.

1. The agreement of November 24, 1943, affected properties, exclusive of the U. S. Savings Bonds and the \$2,400 joint bank account (closed and reopened in the name of decedent's wife only on December 20, 1943) of the value of \$70,697.50, one-half of which (\$35,348.75) the executor included in the gross estate. He included no part of the bank withdrawal in the gross estate. In his notice of deficiency respondent added to the gross estate all of the moneys withdrawn from the bank account (\$2,400) and the remaining one-half value of the other properties (\$35,348.75), as properties transferred by decedent in contemplation of his death under I.R.C. 811(c).

2. On the record the \$2,400 bank withdrawal is to be treated like all of the other property affected by the agreement although only a nominal balance was in the account, which stood in the wife's name only, at the time of decedent's death.
3. What has been said with reference to the U. S. Savings Bonds applies to the other property, including the bank account, affected by the agreement, except that respondent did not even assert that the value of any of such property was includible in the gross estate under I.R.C. Section 811(e)(1).

G. The Tax Court erred in holding that petitioner failed to establish error in respondent's action in treating the "transfer" (if any), to decedent's wife as made in contemplation of death. The principles stated under II, E, *supra*, are applicable here.

IV. The Tax Court erred in failing to find and hold that respondent is estopped by his notice of deficiency from asserting a deficiency under the I.R.C. Section 811(e) with reference to any property involved except the U. S. Savings Bonds. With the exception mentioned, respondent relied solely on I.R.C. Section 811(c).

ARGUMENT.

I.

Rules of Property Established by Law and Decisions of California Courts Are Binding Upon the Federal Courts, and the Tax Court Should Have Applied Them.

Of extreme importance to a proper determination of this proceeding, and a fundamental principle applicable to the entire case, is the extent to which the laws of the State of California are to be applied in determining the nature of the respective interests of decedent and his wife in the properties involved here, as well as the status of those properties following the acts engaged in by decedent and his wife concerning them.

Among other things, petitioner contends the Tax Court was required to recognize the applicability of the laws of the State of California and the rules of property enunciated by its courts, and in failing to do so erred.

Prior to November 19, 1943, all of the properties involved in this proceeding, except those standing in decedent's name were owned and held in joint tenancy, and those standing in decedent's name alone, were either held in joint tenancy by decedent and his wife or were owned by decedent alone. [Tr. 32.] The joint holdings were true joint tenancies. (*Cf. Tomaier v. Tomaier* (1934), 23 Cal. 2d 754, 156 P. 2d 905.) Moreover the court found that prior to November 24, 1943, all of the property owned by the spouses and each of them, except one parcel of real estate (held in decedent's name), was held in joint tenancy by decedent and his wife. [Tr. 99.]

From the time of the decision of *Burgess v. Seligman* (1882), 107 U. S. 20, 2 Sup. Ct. 10, and the host of cases subsequently decided such as *Warburton v. White* (1900), 176 U. S. 484, 20 Sup. Ct. 404, it has been established that a rule of property fixed by decisions of a state court is binding on the Federal courts and such courts will adopt the local construction, whether those decisions are grounded on the statutes of the state or form a part of its unwritten law. (*Laugharn v. Bank of America N. T. & S. A.* (1937, C. C. A. 9), 88 F. 2d 551, cert. den. 301 U. S. 699, 57 Sup. Ct. 929, and *Edward Hines Yellow Pine, Trustees v. Martin* (1925), 268 U. S. 458, 45 Sup. Ct. 543; Cf. *Talcott v. U. S.* (1928, C. C. A. 9), 23 F. 2d 897, 899.)

In the field of federal taxation, the influence and applicability of local law has been met most frequently in matters of statutory interpretation. Congress by its enactments imposes a tax upon certain legal or property rights. If the Congressional legislation does not expressly define such legal or property rights, the court must look to local law for a definition of such interests. When such rights are so fixed, the taxability under federal mandate becomes established.

Congress has not seen fit to define any of the property interests concerned with here, and accordingly the local law must be looked to. Thus, before the taxable consequences of Congressional enactments may be decided upon on the facts here and the acts of decedent and his spouse, it is necessary to determine what interest decedent and his wife individually owned in the property subject to the asserted deficiency.

Thus, as said by Learned Hand, J., in *Johnston v. Helvering* (1944, C. C. A. 2), 144 F. 2d 208, cert. den. 323 U. S. 715, 65 Sup. Ct. 41:

“* * * when Congress imposes taxes based upon the existence of legal rights or duties, it must be understood to refer to such rights and duties as the state law creates, since there are no others; nor could there be, unless Congress were to set up for its fiscal uses systems of municipal law parallel with those already existing in the states. * * *” (p. 210.)

The question has also been the subject of extended discussion by Paul in his work on estate and gift taxation. He says:

“Local law always governs in the determination of property rights, and to that extent federal tax law always absorbs local law. Once these rights are ascertained the federal criteria of taxability prevail.” (*Paul, Federal Estate and Gift Taxation*, 1946 Supp., p. 11.)

This proposition is also expressed in *Helvering v. Stuart* (1942), 317 U. S. 154, 63 Sup. Ct. 140, wherein there is distinguished a determination of “what interests or rights should be taxed” and a determination of “what interests or rights have been created.” Federal law governs in the former case and local law in the latter. (*Cf. Paul, Federal Estate and Gift Taxation*, 1946 Supp., p. 11.)

These principles were confirmed in *Lang v. C. I. R.* (1938), 304 U. S. 264, 58 Sup. St. 880, affirming the decision of this court in 97 F. 2d 867. There it was held in applying the federal estate tax that incidents and inter-

ests under local property laws would govern to determine the nature of the estate taxed. See also: *Blair v. Com'r* (1936), 300 U. S. 5, 57 Sup. Ct. 330; *Fruelev. Helvering* (1933), 291 U. S. 35, 54 Sup. Ct. 308; and *C. I. R. v. Cadwallader* (1942, C. C. A. 9), 127 F. 2d 547, 548, all holding the application of federal tax statutes to be dependent upon local law.

In *Tooley v. Com'r* (1941, C. C. A. 9), 121 F. 2d 350, this court held that the federal Court, in determining whether a surviving joint tenant holds the deceased tenant's share in property under the original grant or as transferee of the deceased tenant, must apply and be governed by the state law. In *U. S. v. Pierotti* (1946, C. C. A. 9), 154 F. 2d 758, this court said:

"It is conceded that state law governs in determining the gross estate of a decedent for Federal Estate Tax purposes, and in determining *the nature of the tenancy* by which property is held by married persons in California." (p. 762.) (Our emphasis.)

Pertinent too is *Fox v. Rosthensies* (1940, C. C. A. 3), 115 F. 2d 42, where the court held it was bound by local rules of property and decisions of the state's Supreme Court regarding tenancy by the entirety in applying the federal estate tax.

The precise question is whether the Tax Court was bound to determine the nature, interests and rights of decedent and his wife in their joint tenancy properties according to local law. In this respect, a number of decisions under federal tax laws have applied local law and rules concerning joint tenancies. In *Edmonds v. Com'r* (1937, C. C. A. 9), 90 F. 2d 14, the Court deciding

certain income tax questions discussed the incidents of joint tenancy enunciated by California statutes and case law and applied that law. See particularly concurring opinion of Wilbur, J. on page 18.

In *Greenwood v. Com'r* (1943, C. C. A. 9), 134 F. 2d 915, it was said:

“In determining the gross estate of a decedent for the purpose of computing the Federal Estate Tax we must look to state law” (p. 918).

(Citing *Lang v. Com'r*, *supra*.)

In *Gwinn v. Com'r* (1932, C. C. A. 9), 54 F. 2d 728, affirmed in 287 U. S. 224, 53 Sup. Ct. 157, the court held the “transfer” (in a tax sense) of a deceased joint tenant’s estate upon his death was taxable. Both the Court of Appeals and the Supreme Court recognized the incidents of joint tenancy established by state law. The Court said:

“Section 683, Civil Code of California, in defining joint tenancy, makes no change in the character, attributes, or incidents which the common law assigned that species of property holding. The unities of title, interest, and possession remain affixed. Under the common law, one of such tenants had not the right to the exclusive possession of the property, and that right accrued to him only upon the death of his cotenant; *and his cotenant might destroy the joint tenancy during his lifetime by transfer of his interest; he could also cause partition of the property to be decreed in proportion to interests.* Mr. Kent, in his Commentaries (volume 4, p. 360, 4th Ed.), treating

of the subject of joint tenancy, says: 'A joint tenant in respect to his companion is seized of the whole; but for the purposes of alienation * * * he is seized only of his individual part or proportion.'" (P. 729.) (Our emphasis.)

The Supreme Court in its affirming decision, at page 228 of 287 U. S., says:

"Although the property here involved was held under a joint tenancy with the right of survivorship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed *since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution.* Cal. Code Civ. Proc. §752; *Green v. Skinner*, 185 Cal. 435, 197 Pac. 60; *Hilborn v. Soale*, 44 Cal. App. 115, 185 Pac. 982. The right to effect these changes in the estate was not terminated until the co-tenant's death." (Our emphasis.)

See also to the same effect as the above authorities:

Talcott v. U. S. (C. C. A. 9, 1928), 23 F. 2d 897;

Gillis v. Welch (C. C. A. 9, 1935), 80 F. 2d 165.

From the foregoing discussion it is clear that the Tax Court should have applied the local law consistently in determining property rights and interests of the spouses in this case.

II.

The Tax Court Erred in Holding That the Whole or Any Part of the Value of the Securities Transferred by Decedent and His Wife to Their Son Was Includible in the Value of Decedent's Gross Estate.

A. THE NATURE OF THE RESPECTIVE INTERESTS OF THE DONORS.

As pointed out in our statement of the case, it was stipulated, in substance, that all of the properties given to Floyd K. Sullivan, except those standing in decedent's name alone at and prior to the time of the gifts (November 19, 1943), were then owned by the spouses as joint tenants. It was also pointed out that the aggregate value of the securities then standing in decedent's name alone was \$12,340.63. It was therefore conceded and in effect stipulated by the litigants, and must be taken to be a fact in the case, that donated securities of a minimum value of \$21,185.91 were owned by the donors as joint tenants at the time of the gifts. Petitioner contends that *all* of the donated securities, aggregating \$33,526.54, were so owned by the donors at the time of the gifts, and that the Tax Court should have so found.

At this point it is desirable to consider the nature and incidents of the joint tenancy holdings which, as before indicated, are governed by California law.

At the outset it should be noted that respondent has not taken the position that the value of any part of the securities transferred to the son of decedent and his wife was includible in decedent's gross estate under or by virtue of Section 811(e)(1) of the Internal Revenue Code, which, subject to specified exceptions, imposes an

estate tax upon the value of properties held by the decedent and another person as joint tenants (at the time of decedent's death), or held by decedent and his or her spouse as tenants by the entirety at said time. Respondent seeks to impose the tax under the provisions of Internal Revenue Code Section 811(c) relating to gifts in contemplation of death. The Tax Court sustained his determination of the deficiency but held that the value of the donated securities was includible in decedent's gross estate under Internal Revenue Code Section 811(e)(1).

The importance of reviewing the joint tenancy rules and concepts at this point results from the necessity of determining what was or could have been taxed under Section 811(c) or Section 811(e)(1). The answer to this inquiry depends, not only upon what motivated the transfer or transfers, but also upon what property was transferred, by whom, the values of the transferred interests, and the nature of the interests of the spouses in the properties.

Section 683 of the California Civil Code provides:

“§683. (*Joint tenancy defined, and how created.*) A joint interest is one owned by two or more persons in *equal shares*, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common to themselves, or to themselves and others, or from a husband and wife when holding title as community property or otherwise to themselves or to themselves and others when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created

by a written transfer, instrument or agreement. Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act.” (Our emphasis.)

Under Civil Code Section 683 and the decisions of California courts, the interest of a joint tenant is his separate property. This is a rule of property of the State of California. *Delanoy v. Delanoy* (1932), 216 Cal. 23, 13 P. 2d 513; *In re Sterling* (1937), 20 Fed. Supp. 924 (Cal.); *Estate of Harris* (1937), 9 Cal. 2d 649, 72 P. 2d 873. As before shown herein, the rule is binding upon the federal tribunals.

The basic characteristics of a joint tenancy estate are the four unities of interest, title, time and possession. The attributes of such a tenancy in California are the same as those assigned by the common law to that method of holding property.

Gwinn v. Com'r. (C. C. A. 9), *supra*.

Joint tenants hold their respective interests by the moiety and by the whole. This means that such tenants are seized of the entire estate for the purposes of tenure and survivorship, but of a particular part, interest or undivided share for the purpose of alienation, partition or forfeiture. Because of the requirement of unity of interest, the shares of joint tenants must be equal.

Northrup, Law of Real Property, pp. 102-103;

Tiffany, The Law of Real Property (3rd Ed.),
Sec. 418, pp. 196 and 198;

14 *Am. Jur.* 81 and

Cal. Civ. Code, Sec. 683.

The unities of title and time in a joint tenancy will be destroyed if the tenancy is terminated or severed. If any of the unities, except that of possession, is destroyed, the joint tenancy ceases to exist, and a tenancy in common is created by operation of law where the property is vested in two or more persons after the joint tenancy has been terminated.

Northrup, Law of Real Property, p. 109;

Tiffany, The Law of Real Property (3rd Ed.),
Sec. 425, pp. 208-209.

An important incident of a joint tenancy estate is the right of either tenant to alienate his interest in the property without the consent of the other and thereby effect a severance or a termination of the tenancy. Such a termination or severance may be effected by a release by one joint tenant in favor of his cotenant. *Swartzbaugh v. Sampson* (1936), 11 Cal. App. 2d 451, 54 P. 2d 73; *Estate of Harris, supra*. But no joint tenant has the right or power to transfer any part of the interest of another joint tenant.

A joint tenancy may be terminated by mutual agreement or by conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them as tenants in common.

Tiffany, The Law of Real Property (3rd Ed.),
1947 Cum. Supp. Sec. 425, p. 42;

McDonald v. Morley (1940), 15 Cal. 2d 409, 101
P. 2d 690.

The foregoing is particularly applicable to the agreements and acts of decedent and his wife under provisions of California Civil Code Sections 161, 158 and 159, which permit husbands and wives to hold property as joint tenants and to contract with each other respecting their property, pertinent provisions of which are as follows:

“§161. (*May be joint tenants, etc.*) A husband and wife may hold property as joint tenants, tenants in common, or as community property.

“§158. (*Husband and wife may make contracts.*) Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

“§159. (*Contract altering legal relations: Separation agreement.*) A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, * * *.”

From the foregoing authorities it is clear the interests of decedent and his wife in the securities held in joint tenancy and given to their son were equal, undivided interests, the respective interests of the spouses being his or her separate property. Since decedent and his surviving spouse jointly gave the mentioned securities to their son, it follows that one-half of the total interest in the joint tenancy securities acquired by the son was a gift from his father, and the remaining one-half interest in such securities was acquired by him as a gift from his mother. This proposition applies to all of the donated joint tenancy securities, including those the record title to which stood in the name of the decedent alone.

Under the law of California, all property acquired as a result of investment or reinvestment of joint tenancy property, regardless of legal or record title, and in the absence of fraud, is joint tenancy property unless the tenants' intention is shown to be otherwise. Where legal title to property acquired with the proceeds of joint tenancy property is taken in the name of one of the tenants alone, it will be impressed with the character of its source and the holder deemed a trustee for the joint tenancy.

Estate of Harris (1915), 169 Cal. 725, 147 Pac. 967;

Fish v. Sec.-First National Bank (1948), 31 Adv. Cal. 388, 189 P. 2d 10.

The evidence before the Tax Court was uncontradicted that all of the proceeds of the property owned or held by decedent and his wife as joint tenants were reinvested in other properties without any intention on the part of either spouse to alter the joint tenancy character of their holdings, and that the spouses intended, believed and thought they owned and held all of their property in joint tenancy from the time they made California their home until the agreement of November 24, 1943, was executed. [Tr. 125-126.] Their intention is to be given effect until the opposite be shown, however the legal or record title may be held. Thus, all property involved in this proceeding at and immediately prior to the time the gifts to the son were made (November 19, 1943), even though it stood in the name of decedent alone, must be deemed to have been joint tenancy property and impressed with its characteristics. The gifts to the son therefore consisted of a gift

of an undivided one-half interest valued at \$16,763.27 from decedent, and a gift of an undivided one-half interest valued at \$16,763.27 from decedent's wife. By these gifts decedent and his wife completely divested themselves of all interest in the donated securities and such securities were not, therefore, held by the spouses as joint tenants or otherwise at the time of decedent's death.

B. ANALYSIS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

As was pointed out in our statement of the case, it was settled by stipulation that the aggregate value of the securities transferred to Floyd K. Sullivan was \$33,526.54, and that all of the securities except those of an aggregate value of \$12,340.63 (which were held in the name of decedent alone at and prior to the time of the gifts) were owned by him and his wife as joint tenants. It was thus conceded by the parties that donated securities of at least \$21,185.91 were owned by the spouses as joint tenants when the gifts were made.

An issue was raised by the pleadings as to whether the securities held in decedent's name alone were owned by him only or by the spouses as joint tenants. This was a material issue upon which the Tax Court made no finding of fact, unless the finding of fact to the effect that the transfer of November 19, 1943, was in contemplation of death amounts to a finding upon such issue. Construed as such a finding, the finding is clearly contrary to the stipulation of facts (and to the evidence) if it means that the decedent was the sole owner of all of the transferred securities; and the finding is clearly unsupported by and contrary to the evidence to the extent that it determines that the securities standing in decedent's name only, were

owned by him alone and not by the spouses as joint tenants. The Tax Court therefore erred in failing to make a finding of fact on that material issue, or its findings were unsupported by and contrary to the evidence in the particulars just discussed.

The Court should have found as a fact that all of the donated securities, having an aggregate value of \$33,526.54, were owned by the spouses as joint tenants when the gifts were made; and that the gifts consisted of an undivided one-half interest of the value of \$16,763.27 transferred by decedent, and an undivided one-half interest of the value of \$16,763.27 transferred by the wife. Even if the evidence had warranted a finding that the donated securities standing in decedent's name alone were owned by him only at the time of the gifts, the maximum value of the interest transferred by him to his son was \$22,933.59, and the minimum value of the interest transferred by his wife to the son was \$10,592.95, and it was error for the Tax Court to fail to make such a finding. If by any strained construction such a finding can be found in the record, then it clearly does not support the conclusion of law and holding that the entire value of the donated securities (\$33,526.54) is includible in decedent's gross estate as a transfer made by him in contemplation of his death, and the decision is erroneous to the extent it rests upon such erroneous conclusion of law and holding.

It was implicit in the findings of fact that by making the gifts to their son the spouses parted with all interest in the donated securities. The conclusion of the Tax Court that such securities were includible in decedent's gross estate as jointly held property under I. R. C., Section 811(e)(1), was therefore not supported by the findings.

C. THE GIFT FROM DECEDENT'S WIFE TO HER SON.

By including in decedent's gross estate the value of the interest owned by decedent's wife in the donated securities, respondent in effect subjected to tax her interest as a transfer by decedent in contemplation of his own death under Section 811(c), I. R. C., and the Tax Court's decision confirms the determination of respondent in this connection but imposes the tax, not under I. R. C., Section 811(c), but under I. R. C., Section 811(e)(1). The value of the wife's interest so included was, petitioner contends, \$16,763.27, but on no construction of the findings of fact, in view of the stipulated facts and the evidence, could it have been less than \$10,592.95, as before pointed out herein. The Tax Court's action in this connection is, we believe, without precedent. Our research reveals no similar holding or decision.

As previously indicated herein, the law is settled that decedent's spouse could have alienated her one-half interest to her son, or another person, without the necessity of decedent's joining with her or consenting to such transfer (*Estate of Harris*, 9 Cal. 2d 649, *supra*), and the property was owned by her as her separate interest and not by decedent. And the law is also settled that decedent, as one of two joint tenants, did not have the legal *power* to transfer the whole or any part of the interest of his cotenant; where there are two joint tenants one of them can transfer no more than an undivided one-half interest in the properties.

The language of Section 811(c) is plain and is applicable only to "the extent of any interest * * * of which * * * decedent has * * * made a transfer. * * *" (Our emphasis.) It is clear from the section that the only transfers affected by it are transfers made

by decedent. (*Brown v. Routzahn* (C. C. A. 6, 1933), 63 F. 2d 914, cert. den. 290 U. S. 641, 54 S. Ct. 60, reh. D. C. Ohio, aff'd (C. C. A. 6, 1938) 95 F. 2d 766; *Williams v. United States* (1930), 41 F. 2d 895, 70 Ct. Cl. 267.) It is also implicit in the section that a *transfer*, within the meaning of I. R. C., Section 811(c), must be a transfer of property owned by the decedent.

Amelia Solomon (1941), 43 B. T. A. 234;

Comm'l Nat. Bank (1937), 36 B. T. A. 239.

Unless the Tax Court's findings of fact are construed as determining that the decedent alone owned and transferred all of the securities (an erroneous finding as before shown), the effect of the holding and decision, insofar as it supports respondent's action, is to include, as a transfer in contemplation of death under I. R. C., Section 811(c), a property interest (his wife's) which the decedent did not own, had no power to transfer and did not transfer. This action of the Tax Court was in conflict with the plain language of the statute and was contrary to authority. It was palpably erroneous and should not be permitted to stand.

What we have said disposes of the proposition that respondent may include the property of the decedent's spouse, transferred by her to her son, in his estate as a transfer taxable under I. R. C., Sections 811(c) or 811(e)(1), and leaves for disposition the question whether the one-half interest transferred by decedent is includible in his gross estate under either of said sections.

D. THE GIFT FROM DECEDENT TO HIS SON.

The presumption that the transfer is in contemplation of death when made within the statutory period prescribed by Section 811(c), I. R. C., is not evidence and is dispelled when any evidence to rebut the same is presented.

Blakeslee v. Smith (D. C. Conn., 1939), 26 Fed. Supp. 28, affirmed (C. C. A. 2, 1940) 110 F. 2d 364.

It is fundamental that the prime element in determining whether decedent's gift to his son was in contemplation of death was the motive actuating it. The incontrovertible evidence discloses that decedent's sole motive was to augment the property of his son and provide him with needed income. Strongly corroborative is evidence showing decedent had previously come to the son's financial rescue, provided him with working capital in an investment business, had given him a home, and accepted less than full payment in complete satisfaction of an indebtedness owing to decedent from his son. [Tr. 126, 162-163, 165-166.]

Other evidence negatives the gift as one in contemplation of death. The value of the interest donated by decedent was only a small portion of his wealth. When the gift was made, decedent, a "very rugged and active" man, was in good health, unaware of any physical ailment or infirmity, if it existed, was physically active, caring for his own business affairs, enjoying the diversion of golf, smoking many cigars daily and generally leading a healthy, energetic life. [Tr. 162, 96.]

As the evidence shows, the actual cause of death was surgery, and though there appears reference in the pre-

operative diagnosis to cancer of the pancreas, there is no evidence that decedent was aware he was so afflicted, the only evidence pertinent to knowledge of his physical condition being that he understood he had some gallbladder complication. Following two surgical procedures between December 20, 1943, and January 3, 1944, decedent died. It appears quite clear that his death was the result of surgery for cancer. [Tr. 134-135.] Under these facts, *Levi, Executor, v. U. S.* (Ct. Cl., 1946), 14 Fed. Supp. 513, is especially significant.

When decedent's intention to make the gift was formed, he was not even contemplating estate or inheritance tax savings. [Tr. 194-195.] There is nothing in the record to show he ever entertained tax-saving notions or that he ever considered the possibility of saving taxes. It is true that Mr. Triplett, a tax attorney, suggested that some advantages might be effected by terminating the joint tenancies of the *remaining* properties, without, however, making "much difference in tax consequences." [Tr. 99, 180-181, 195.] Even construed as tax-saving advice, transfers made as a result of the suggestions of an attorney are not includible under I. R. C., Section 811(c), because the requisite motive is not existent.

Estate of Stinchfield (1945), T. C. M. C. C. H. 14558M, reversed on other grounds in

Com'r v. Stinchfield's Estate (C. C. A. 9, 1947), 161 F. 2d 555.

The evidence conclusively shows decedent and his wife had decided to make the son's gift before they consulted

Mr. Triplett and the object of their first visit to him was to ascertain the amount of gift tax imposed on the *inter vivos* transfer to the son. [Tr. 174.]

Finally, the gift was not a substitute for a testamentary disposition or even for intestate succession. At the time the gift was made the decedent had no testamentary powers over the securities given to the son (since held in joint tenancy) although he had a will in effect. Even if he had left no will and died intestate, the son would have taken none of the securities upon decedent's death. The only way the son could benefit from the securities was to receive them by *inter vivos* gift. The only conclusion reasonably to be drawn from the evidence on this point—and there is none to the contrary—is that a living motive was the dominate, controlling and impelling cause of the gift. See *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, 66 Sup. Ct. 389, which repudiates the test that a “motive” associated with death, for example, avoidance of estate taxes, need only be “substantial” to make a transfer or release “in contemplation of death” and reaffirms the original rule that the thought of death must be “the impelling cause” of the transfer.

The transfer by decedent was not, therefore, within I. R. C., Section 811(c). And obviously no part of the value of the interest transferred by decedent to his son was includible in the gross estate as jointly held property under I. R. C., Section 811(e)(1), because decedent parted with his interest before he died and it was not vested in him at the time of his death.

E. BURDEN OF PROOF.

The two-year presumption established by I. R. C., Section 811(c), applies only to transfers made by *decedent* of a *material part* of *his* property. In this case the evidence shows that only an undivided one-half interest in the donated securities was transferred by decedent and that the value of such interest was not a material part of decedent's property. [Tr. 162.] The remaining undivided one-half interest was transferred not by decedent but by his wife. Accordingly, the presumption created by Section 811(c) was not applicable. Furthermore, if such presumption was applicable, it was dispelled by the evidence which established conclusively that decedent transferred nothing to his son in contemplation of decedent's death.

Also, the Tax Court upheld the imposition of the tax upon the value of the donated securities under I. R. C., Section 811(e)(1), which contains no provision relative to presumptions.

Finally, petitioner clearly satisfied the general burden of proof requirements. He introduced substantial evidence which was not impeached or controverted. Respondent called no witness and introduced no evidence, and the evidence was not in conflict.

The Tax Court plainly erred in holding that petitioner failed to establish error in respondent's action in treating the transfers to Floyd K. Sullivan as transfers made in contemplation of death.

III.

The Tax Court Erred in Holding That Any Part of the Value in Excess of One-half Thereof of the Properties Owned by Decedent and His Wife at the Time of His Death Was Includible in the Value of Decedent's Gross Estate.

A. THE NATURE OF THE PROPERTY INTERESTS OF DECEDENT AND HIS WIFE AT THE TIME OF HIS DEATH.

By the agreement dated November 24, 1943, decedent and his wife, acting solely upon suggestions of their attorney, converted all of the properties then owned by them and each of them into tenancy in common properties. [Tr. 19, 99.] The spouses thereafter owned as tenants in common equal undivided shares and interests in such properties. These facts were, in substance, recognized by the Tax Court in its findings of fact and opinion. [Tr. 99, 109.] The formal transfers by deed and assignment made on November 24, 1943, added nothing to the legal effect of the agreement creating the tenancies in common. The tenancies in common existed at the time of decedent's death and petitioner contends that nothing in excess of the value of decedent's undivided one-half interest in the properties was includible in his gross estate, and that the only applicable taxing law was I. R. C., Section 811(a), which requires the inclusion in decedent's gross estate of all property to the extent of the interest therein of the decedent at the time of his death.

The necessity of considering the nature and extent of the interests of the spouses in the properties at and immediately prior to the time of the execution of the agreement arises solely from the contentions of the respondent as set

forth in his notice of deficiency and the theories of the Tax Court as expounded in its opinion.

Neither respondent nor the Tax Court has asserted that there is a deficiency in estate tax by reason of the failure of the executor to include in his estate tax return, as a part of decedent's gross estate, any part of the value of decedent's interest as a tenant in common, except perhaps one-half of the \$2,400 withdrawn by decedent's wife from the bank account. Respondent asserts that the creation of the tenancies in common involved a transfer by decedent in contemplation of his death and without an adequate and full consideration, thus subjecting the value of the interest of decedent's wife in the properties to estate tax in her husband's estate. Respondent further asserts that the entire value of the United States Savings Bonds is also includible in the gross estate as jointly held property under I. R. C., Section 811(e)(1). The Tax Court agreed with respondent's contemplation of death theory but curiously invoked Section 811(e)(1) and not Section 811(c) of the Internal Revenue Code as specifically authorizing the imposition of the tax.

It was stipulated, and the Tax Court found, that all of the properties affected by the agreement were owned by the spouses and each of them at and immediately prior to the time of the execution of the agreement, as joint tenants, except one parcel of real property (of the value of \$1,500) standing in decedent's name alone. [Tr. 99.]

The total value of the properties affected by the agreement was \$123,125.10 including the moneys (\$2,400) withdrawn by decedent's wife from the bank account on December 20, 1943. It was conceded and stipulated by the parties and found by the Tax Court in substance that properties of an aggregate value of \$121,625.10 (the total

value of \$123,125.10 less \$1,500, the value of the parcel of real property standing in decedent's name alone) were owned by the spouses as joint tenants at and immediately prior to the execution of the agreement. Petitioner contends that all of the properties affected by the agreement, aggregating \$123,125.10 in value, were owned by the spouses as joint tenants at and immediately prior to the execution of the agreement and that the Tax Court should have so found.

Sufficient has already been said in this brief about the general nature and incidents of joint tenancies under the laws of California. The more important of these incidents, in their relation to the subject of the creation of tenancies in common, are these: (a) The interests of joint tenants are equal; (b) one of the essential incidents of a joint tenancy is the right of survivorship vested in each tenant; (c) the tenants may, by agreement or transfer, extinguish the right of survivorship; (d) extinguishment of the right of survivorship will terminate the joint tenancy; and (e) the persons, if more than one, in whom the property remains or is vested upon and after the termination of the joint tenancy become tenants in common by operation of law. It should also be borne in mind that all property acquired with the proceeds of or in exchange for joint tenancy property becomes joint tenancy property in the absence of a contrary intention on the part of the owners of the original properties, and that property may be joint tenancy property although the legal title thereto is vested in or held by one only of the joint tenants.

In this case the spouses did, by agreement of November 24, 1943, abrogate and extinguish their respective rights of survivorship, the joint tenancies were thereby terminated and the spouses thereupon became and thereafter

remained tenants in common. Petitioner contends that the tenancies in common were created by operation of law and not by virtue of any transfer by or to decedent; and that if any transfer was made by decedent in the conversion of the joint tenancy properties, it was made in consideration of another transfer of property of equal (or even greater) value to decedent from his wife, and that the transaction was in substance and effect a sale for an adequate and full consideration in money's worth. Under the view held by petitioner, nothing which was done by decedent or his wife was affected by the provisions of I. R. C., Section 811(c), concerning transfers in contemplation of death, and Section 811(e)(1) of the Code was entirely inapplicable because the spouses did not, at the time of decedent's death, own or hold any property as joint tenants or as tenants by the entirety.

B. ANALYSIS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

As has already been pointed out, it is an established fact in the case that all of the properties affected by the agreement of November 24, 1943, and converted into tenancies in common thereby, except the parcel of land of the value of \$1,500 standing in decedent's name alone, were joint tenancy properties. An issue was raised by the pleadings as to whether the \$1,500 parcel was owned by decedent alone or by the spouses as joint tenants when the agreement was executed. The issue was material, for if all of the properties converted into tenancy in common properties were joint tenancy properties, then the conversion either involved no transfer or, if there was a transfer from decedent to his wife, it was made for an adequate and full consideration in money's worth, and I. R. C., Section 811(c), was inapplicable. Furthermore, if dece-

dent alone owned the parcel at the time of the conversion, he transferred only an undivided one-half interest in it to his wife—an interest valued at \$750—and the value of the properties transferred by decedent to his wife could not have exceeded the value of the consideration received by him therefor by more than \$750, and not more than \$750 in value could have been includible in his gross estate under I. R. C., Section 811(c). (Reg. 105, Sec. 81.15.) The Tax Court erred in not making a finding of fact on this material issue and in not finding the amount, if any, by which the value of the property transferred by decedent to his wife exceeded the value of the consideration received by him for it.

The finding to the effect that the transfer made on November 24, 1943, was in contemplation of death and was not a bona fide sale for an adequate and full consideration in money's worth does not dispose of the issue and is in itself unsupported by and contrary to the evidence. It was implicit in the Tax Court's findings in this connection that the mere fact that the decedent entered into an agreement which resulted in a diminishment of his estate for tax purposes [Tr. 109] rendered his "transfer" to his wife a transfer in contemplation of death. There was no other evidence of a contemplation of death motive, and the two-year presumption was dispelled by the evidence which was introduced. The Supreme Court of the United States has decided that the fact that a transfer is made by the decedent for the purpose of minimizing or avoiding estate taxes is not in itself sufficient to make the transfer one in contemplation of death. *Allen v. Trust Company of Georgia, supra*, and in the case now on review the evidence failed to show even the existence of such a purpose. [Tr. 180-181, 195.] Also, as will hereinafter be shown,

it was established by the evidence that the transfer, if any, made by decedent, was made as a part of a bona fide sale for an adequate and full consideration in money's worth.

The Tax Court also erred in failing to find as a fact that, at the date of decedent's death, all of the property of the spouses was owned by them as tenants in common. The evidence conclusively established that such was the fact, and the Tax Court at least partially recognized this in its opinion by holding that decedent became a tenant in common by virtue of the agreement. [Tr. 109.]

The Court should have found as a fact that all of the properties affected by the agreement were owned by the spouses as joint tenants at the time the agreement was executed; that decedent transferred nothing to his wife in contemplation of his death or otherwise; that if decedent made any transfer to his wife it was made solely as a part of and in consummation of a bona fide sale for an adequate and full consideration in money's worth; that the only properties in which decedent had an interest at the time of his death were those then owned by him and his wife as tenants in common; and that only the value of his undivided one-half interest in the properties as a tenant in common was includible in his gross estate.

C. ONLY ONE-HALF OF THE VALUE OF THE UNITED STATES SAVINGS BONDS WAS INCLUDIBLE IN DECEDENT'S GROSS ESTATE.

The U. S. Series G Bonds issued in the joint names of "Frank K. Sullivan or Hattie B. Sullivan" remained in such form until subsequent to decedent's death, when, for the first time the bonds could be redeemed, and formal transfers were then effected. [Tr. 99.]

Section 704 of the California Civil Code, effective February 10, 1943, provides in part as follows:

“§704. (Bonds or obligations of the United States.)

“(Registration in two names as co-owners in alternative.) All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the names of two persons as co-owners in the alternative, shall, upon the death of either of the registered co-owners, become the sole and absolute property of the surviving co-owner, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.

* * * * *

“(Construction of section.) This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided.”

Since tenancies by the entireties are not recognized in California, it must follow under the stipulation, the quoted statute and the findings of the Tax Court [Tr. 32, 99], that said bonds were held in joint tenancy.

As previously stated herein, the mutual agreement of joint tenants is effective to sever a joint tenancy and one tenant can sever such an estate without the consent of his co-tenant by virtue of the right of alienation incident to it. These principles are particularly applicable to husbands and wives who so hold property, under their contract rights. (Cal. Civ. Code, Sec. 158.)

In consequence, the agreement of November 24, 1943, operated *co instanti* to sever the joint tenancy ownership of said bonds and effected by operation of law a commutation of the interests of decedent and his wife to those of tenants in common.

Tiffany, The Law of Real Property (3rd Ed.)
Sec. 425, p. 211;

Estate of Lester L. Fletcher (1941), 44 B. T. A.
429.

The agreement severing the joint tenancies was effective upon its execution, notwithstanding formal transfers were not accomplished until after decedent's death. Even an oral agreement would have sufficed to accomplish the purpose. *Estate of Lester L. Fletcher, supra*. In any event it was impossible to procure formal transfer of the bonds and to divide them equally until after decedent's death [Tr. 22, 160-161], and the Tax Court so found. [Tr. 99.]

The action of respondent served to include the total value of the United States Savings Bonds in decedent's gross estate under I. R. C., Section 811(c) as well as I. R. C., Section 811(e). One-half of the total value was included in decedent's estate tax return. The initial question then is, does Section 811(c) apply to the commutation by operation of law of decedent's and his wife's interests as joint tenants into undivided interests as tenants in common?

As indicated above, under California law each joint tenant's interest is his separate estate. Consequently prior to the execution of the agreement of November 24, 1943, decedent and his wife separately enjoyed equal undivided interests in the whole of the bonds. By virtue of the four

unities, they each likewise had actual present possession, management and control. Pursuant to the doctrine of survivorship, either would become the owner of the whole if he or she outlived the other. After the agreement was executed, decedent and his wife each separately owned an undivided one-half interest in the whole and each had a statutory right to dispose of his or her share by will, a right neither enjoyed as a joint tenant, but each had relinquished the possibility of becoming complete owner of the whole by virtue of survival.

Mrs. Sullivan's expectancy was greater than decedent's (she survived decedent, as the Tax Court found [Tr. 101]) and thus if any transfer occurred, the real effect of the agreement was that she relinquished more than decedent did. *Sampson v. Welch* (D. C. Cal. 1938), 23 Fed. Supp. 271, 287. The right of survivorship was a property right of substantial monetary value. Had the wife possessed it at the time of decedent's death, it would have been worth to her in excess of \$25,000, viz., the value of decedent's one-half interest. If the agreement operated to effect a change of property interests by transfers, including the rights of survivorship, from one spouse to the other, one of its results was the surrender of decedent's survivorship right to his wife and the surrender of her more valuable survivorship right to decedent, and the value of the remaining interests retained by or vesting in each spouse was exactly equal to the value of the interest he or she therefore had, exclusive of his or her surrendered survivorship right. Therefore, decedent's wife actually parted with more than she received from decedent, if the rights of survivorship are taken into account. Actually, of course, neither right of survivorship was transferred, and if the residual interests were transferred, they

were of equal value. As we view the transaction, no transfer by either spouse occurred at or after the time the agreement was executed except formal transfers made for record title purposes only, which added nothing to the effect of the agreement.

Whether the wife did or did not contribute property or services to the acquisition of the joint tenancy properties is immaterial. There was no joint tenancy property in existence at the time of decedent's death and I. R. C., Section 811(e)(1), which makes the survivor's contribution material, was inapplicable. However, the record shows that in 1922, following decedent's retirement, he and his wife moved to California and all property accumulated by him in Minnesota was invested in joint tenancy properties and all proceeds of the sale thereof were re-invested in properties of like character. If any transfer (as that word is used in Section 811(c)) occurred, it is submitted that it took place when the joint tenancies were first created—not in November, 1943, twenty years after the event; but respondent did not assert, the evidence did not show, and the Tax Court did not find or hold that any such transfer was made in contemplation of decedent's death. In each succeeding property acquisition or investment with the proceeds of such joint tenancy property, the wife obviously furnished one-half the consideration. Therefore if the bonds could be regarded as jointly held property under I. R. C., Section 811(e)(1), either by an application thereof retroactively to the time of the execution of the agreement or because the joint registration thereof was not changed during decedent's lifetime, or on any other theory, one-half of the value thereof was excluded from the gross estate by the express language of the section.

If the transaction in which the agreement was executed is viewed as one effecting a transfer from decedent to his wife in consideration of a transfer from her to him it is only the value of the interest transferred by him which could possibly be included in his gross estate under Section 811(c). If he received nothing he transferred nothing, and the maximum value which could have been included in decedent's gross estate under I. R. C., Section 811(c) was zero. If he received anything of value by way of transfer from his wife, the value of what he received was commensurate with (or in excess of) the value of what he transferred, and his transfer was one for a full and adequate consideration in money's worth. If on any theory the value of the consideration received by decedent was not exactly commensurate with that which he gave, only the excess of the value of the interest transferred by him over the value of the interest received by him could be includible in his gross estate as a transfer in contemplation of death, Reg. 105, Sec. 81.15; and if there was any difference between the values, decedent's wife actually gave up more than she received since her survivorship right was of greater value than the value of his similar right because of her greater life expectancy—which was convincingly established by the fact that she did survive him. There would therefore be no excess value includible in his gross estate under said regulation.

The Tax Court held that at most the division of the two estates constituted "an exchange" and that Section 811(c) does not include "exchange," and therefore it could not fall within the section relative to a sale for a full and adequate consideration in money or money's worth. In so holding it patently appears that the Tax Court gives no consideration to the use by Congress of the words "money's worth."

In *Hale v. Helvering* (1936 App. D. C.), 85 F. 2d 819, the Court said:

“The word “sell” . . . in its ordinary sense means a transfer of property for a fixed price in money *or its equivalent*.’ United States v. Benedict (C. C. A.), 280 F. 76, 80.

* * * * *

“The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money which is but the representative of value of property. Com. v. Clark, 14 Gray (Mass.) 367.’ Black’s Law Dictionary, 3rd ed. 713.” (P. 821.) (Our emphasis.)

In *Ferguson v. Dickson* (1924, C. C. A. 3), 300 Fed. 961, it was said:

“Every transfer of property for an equivalent is practically and essentially a sale, and * * * money’s worth is a valuable consideration (for the sale) as much as money itself.’ Huff v. Hall, 56 Mich. 456, 23 N. W. 88.” (P. 963.)

Because the word “exchange” does not appear in Section 811(c), the Tax Court is saying the transaction is not excepted from the application of the section. We submit this is an untenable thesis. If Congress in enacting Section 811(c) had not contemplated that there would

occur transfers of property for consideration other than money, there would have been no necessity for the use of the term "money's worth." The irresistible conclusion is that the term "money's worth" connotes an exchange and means an exchange. Statutory interpretation compels the giving of meaning to all the language used and it is inconsistent to fail to give consideration to the words "money's worth." In this case it clearly appears that the transaction constituted a sale for an adequate and full consideration in money's worth. If a sale is effected for money's worth, as distinguished from money, of necessity it means an exchange.

Furthermore, the evidence showed and the Tax Court found that the division of the properties on November 24, 1943, was the result of suggestions of decedent's and his wife's attorney. [Tr. 195, 99.] Under such circumstances the requisite motive under Section 811(c) cannot be imputed to decedent.

Estate of Stinchfield, supra.

The deficiency notice of respondent included the United States Savings Bonds in decedent's gross estate under both Sections 811(c) and 811(e), I. R. C. By virtue of the stipulation and findings of the Tax Court, the only provision of Section 811(e) here involved is 811(e)(1). However, the deficiency notice did not so specify. It has been shown that such bonds were not includible under Section 811(c) for the reasons above stated.

There then remains respondent's contention that the bonds were includible under Section 811(e)(1).

The Tax Court sanctioned the inclusion of the value of Mrs. Sullivan's interest in the bonds under I. R. C., Section 811(e)(1). This is apparent from the observations of

the Court concerning her contribution to the acquisition of the joint tenancy properties. [Tr. 112-113.] The contribution of the surviving spouse is not material in considering the application of I. R. C., Section 811(c), but it is expressly made so by the language of I. R. C., Section 811(e)(1). However, there was no joint tenancy property in existence at the time of decedent's death, so I. R. C., Section 811(e)(1) was not applicable. The Court held it applicable upon the circuitous and novel theory that decedent made a transfer in contemplation of his death under I. R. C., Section 811(c), that the effect of that section was to avoid the "transfer" and leave the property in the same category it occupied before the "transfer" was made (*i. e.*, joint tenancy property), and that I. R. C., Section 811(e)(1), in view of its provisions relative to contribution, subjected the entire value of the property to tax. The authority relied on by the Court was a sentence appearing in the opinion of the Court in *Iglehart v. Comm.* (C. C. A. 5, 1935), 77 F. 2d 704. [Tr. 112.] The case cited does not support the theory of the Tax Court in the case now on review. In the *Iglehart* case the Court held that certain transfers were *taxable as transfers in contemplation of death* under Section 302(c) of the Revenue Act of 1926, *not as jointly held property* or otherwise. Also the language of the opinion now relied upon by the Tax Court had reference solely to the subject of *valuation* of properties transferred in contemplation of death. There is nothing in the *Iglehart* case which authorizes the Tax Court to avoid a "transfer" under I. R. C., Section 811(c), and then to tax the "transferred" property under I. R. C., Section 811(e)(1), as the Court attempts to do here.

I. R. C., Section 811, specifies what property interests are includible in a decedent's gross estate and are subject

to estate taxes. Each of the numerous subsections covers specified interests, transfers and other acts subject to tax. The form of the various subsections read in conjunction with the first paragraph of the section, is the same. Section 811(e)(1) is a *taxing* section, as the Tax Court implicitly holds. Therefore, we submit, Section 811(c) is also a *taxing* section—not an *avoiding* section. One of the vicious effects of what the Tax Court has done in this case is to import into Section 811(e)(1), the presumption and other unique provisions of Section 811(c), and to import into Section 811(c) the contribution and tax-imposing provisions of Section 811(e)(1). This might or might not be good tax policy, but we submit that it is for Congress and not the Tax Court to crystallize it into law. As Professor Griswold has well said (*Cases and Materials on Federal Taxation*, 2d Ed., p. 14):

“There is no use in thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute.”

Respondent should not be permitted to attempt to tax property under a plurality of sections. If it is taxable, it is so by virtue of one of the subsections of I. R. C., Section 811, and not a number of them. If it is not taxable under Section 811(c), and we believe this is clear, then it is not taxable under any other section and respondent's alternative attempt must fail.

Estate of Nathalie Koussevitsky (1945), 5 T. C. 650.

If the agreement of November 24, 1943, did not effect a transfer in contemplation of death, then it was effective for all purposes including tax purposes. That agreement was effective immediately upon execution, and one result was a severance of the joint tenancy in the bonds. By the destruction of the unity of title, a tenancy in common was effected and the interests of decedent and his wife commuted. At decedent's death only the one-half belonging to him held as a tenant in common constituted property owned by him and includible in his estate. That one-half was included in the estate tax return. (*Estate of Mary C. Milner, supra.*) It is noteworthy that the Tax Court found as a fact that these bonds, prior to November 24, 1943, were held in joint tenancy, that the Court then held that after the performance of the agreement decedent had only tenancy in common property. [Tr. 99, 109.]

According to respondent's Regulations, Section 811 (e)(1) applies to all classes of property where the survivor takes the entire interest by right of survivorship and no interest therein forms a part of decedent's estate for purposes of administration. "*It has no reference to properties held by decedent and any other person or persons as tenants in common.*" (Reg. 105, Sec. 81.22.) Here there existed no survivorship rights; they were relinquished by decedent and his spouse prior to his death. One-half of the total value of the bonds was a part of decedent's estate, administered therein, and the property was held as a tenancy in common at the date of his death.

Clearly, therefore, under the language of Section 811(e)(1), respondent's Regulations and the Tax Court's own determination that decedent received a half interest as a tenant in common, only one-half of the value of the bonds held by decedent as tenant in common is includible in his gross estate, not under either Section 811(c) or Section 811(e)(1) but under Section 811(a).

Estate of Irwin A. Smith (1941), 45 B. T. A. 59,
and

Merry M. Dennis, Executor, v. Com'r (1932), 26
B. T. A. 1120.

D. ONLY ONE-HALF OF THE VALUE OF THE PROPERTIES,
EXCLUSIVE OF THE UNITED STATES SAVINGS BONDS,
AFFECTED BY THE AGREEMENT WAS INCLUDIBLE IN
DECEDENT'S GROSS ESTATE.

What has heretofore been said concerning the impropriety of including in decedent's gross estate more than one-half of the value of the United States Savings Bonds is equally applicable to the remainder of the properties affected by the agreement of November 24, 1943, and little need be added to the previous discussion except to point out again that the sole ground upon which respondent sought to justify the inclusion in the gross estate of more than one-half of the value of such remaining properties was that decedent had made a transfer in contemplation of death. Respondent did not claim, as he did with respect to said bonds, that the additional one-half value was includible in the gross estate as joint tenancy property

or otherwise under Section 811(e)(1) of the Internal Revenue Code. However, the bonds, as well as the other property, were, in fact, tenancy in common property at the date of the death of the decedent, as the Tax Court recognized in its opinion, and the Tax Court treated all of the property covered by the agreement alike. [Tr. 109.]

At the time of his death, only a nominal balance remained in the bank account opened by decedent's wife in her name on December 20, 1943, but this fact is not shown in the record. Petitioner therefore concedes that upon the facts shown by the record, one-half of the \$2,400 withdrawn from the account, namely, the \$1,200 interest of decedent as a tenant in common, was held by Mrs. Sullivan in trust for her husband and might have been includible in decedent's gross estate under I. R. C., Section 811(a). However, respondent has not asserted in his notice of deficiency or otherwise, that such one-half was includible in the gross estate except as property transferred in contemplation of death under I. R. C., Section 811(c); and the Tax Court held that it was includible as jointly held property under Section 811(e)(1) although the account was in the name of decedent's wife only at the time of decedent's death and was then owned by the spouses as tenants in common. We submit, therefore, that for purposes of this case the \$2,400 withdrawal is to be treated in the same manner as any of the other property, exclusive of United States Savings Bonds, covered by the agreement.

It is clear from what has been said that in sanctioning the inclusion in the gross estate of the value of the interest

of decedent's wife in the properties, other than the bonds, affected by the agreement, the Court erred in the same particulars as it did with reference to the bonds.

E. BURDEN OF PROOF.

The two-year presumption established by I. R. C., Section 811(c), applies only in cases where *decedent* has made a *transfer* of a material part of *his* property. Here no transfer was made; or if one was made, not more than a one-half interest in the joint tenancy properties was transferred by decedent, for he had no power to transfer his wife's interest. Also the presumption, if applicable at all, was dispelled by the evidence which established conclusively that decedent transferred nothing to his wife in contemplation of his death.

Also, the Tax Court upheld the imposition of the tax under I. R. C., Section 811(e)(1), which contains no provisions relative to presumptions.

Finally, petitioner clearly satisfied the general burden of proof requirements. He introduced substantial evidence and it was not impeached or controverted. Respondent called no witness and introduced no evidence, and the evidence was not in conflict.

The Tax Court was therefore in error in holding that petitioner failed to establish error in the action of respondent in treating the "transfer" (if any) to decedent's wife by severance of joint tenancy as having been made in contemplation of death. [Tr. 107.]

IV.

The Tax Court Erred in Failing to Find and to Hold That Respondent Is Estopped and Precluded by His Notice of Deficiency From Assessing Any Deficiency Based Upon His Inclusion in the Gross Estate Under I. R. C., Section 811(e), of Any Property Other Than the United States Savings Bonds.

The only statutory ground asserted by respondent in his notice of deficiency for subjecting to tax any of the property given to Floyd K. Sullivan, or any interest in excess of one-half thereof in the remainder of the properties involved, other than the United States Savings Bonds, was I. R. C., Section 811(c).

It is submitted that the respondent is bound by his notice and should be estopped and precluded from assessing a deficiency under I. R. C., Section 811(e)(1), with reference to any of the properties involved other than the United States Savings Bonds.

Conclusion.

It is respectfully submitted that for the foregoing reasons the decision of the Tax Court should be reversed (26 U. S. C. A., Sec. 1141(c)(1)), and that petitioner should be awarded his costs (28 U. S. C. A., Sec. 1920).

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APPENDIX.

Provisions of Internal Revenue Code involved in this proceeding are as follows:

“§811. Gross estate.

“The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States. . . .” (§811 (Preamble), I. R. C.; 26 U. S. C. A., §811.)

“(a) Decedent’s interest. To the extent of the interest therein of the decedent at the time of his death;” (§811(a), I. R. C.; 26 U. S. C. A., §811(a).)

* * * * *

“(c) Transfers in contemplation of, or taking effect at death. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money’s worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have

been made in contemplation of death within the meaning of this subchapter.” (§811(c), I. R. C.; 26 U. S. C. A., §811(c).)

* * * * *

“(e) Joint and community interests.

“(1) Joint interests. To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money’s worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money’s worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided, further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.” (§811(e)(1), I. R. C.; 26 U. S. C. A., §811(e)(1).)

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Respondent.

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Respondent.

BRIEF OF AMICI CURIAE

**PRELIMINARY STATEMENT OF PURPOSE
AND SCOPE OF BRIEF**

Pursuant to leave of this Court, the undersigned attorneys file this brief as amici curiae. We do not act on behalf of any specific clients, but believe that certain legal issues are of importance to various taxpayers whom we represent as well as to taxpayers generally. On these issues we consider that the Tax Court committed serious errors which, in effect, read into the Federal estate tax laws, without support from Congress, a nullification of a wife's rights in joint tenancy property.

The Tax Court in this case held that:

1. All the transactions in which Frank K. Sullivan, hereinafter called the "decedent," participated were done by him in contemplation of death.

2. The transaction which consisted of the division or partition of joint tenancy properties belonging to decedent and his wife as equal joint tenants, whereby each took one half as separate property, was a "transfer" by decedent to his wife of the wife's half "interest" (which had been vested in her before the transaction) within the meaning of the terms "transfer" and "interest" in Section 811(c);* (this holding by the Tax Court is not expressly set out in the opinion nor is there any discussion of it, but it is implicit in the decision that Section 811(c) applies);

3. Such "transfer" by such partition of joint tenancy properties was not "a bona fide sale for an adequate and full consideration in money or money's worth" within the provision of Section 811(c); and

4. A gift made by the decedent and his wife to their son, consisting of property held by the two donors as joint tenants, was to be deemed entirely made by decedent under Section 811(c) and not in any part by his wife, despite her vested half interest.

The Tax Court's conclusion on the basis of these four holdings was that all the properties involved in these transactions were to be included 100% in decedent's taxable estate.

We do not propose to take any position with respect to the first holding, i.e., contemplation of death. Since it is dependent on the particular facts as to decedent's state of mind, as well as the two-year statutory presumption, we do not consider this holding important to our clients or to taxpayers generally. We shall therefore assume in this brief that the Tax Court was correct in such holding, although we do not thereby intend to express any views of our own on this subject. If this Court shall hold that the transfer was not in contemplation of death that is an end of the case.

*Unless otherwise noted, all references to Sections and subsections are to the Internal Revenue Code. The provisions mentioned are quoted in the Appendix hereto.

We do, however, disagree completely with holdings 2 and 3, above outlined, and we propose to demonstrate that they are both erroneous. We are also of the view that holding 4 is wholly unsupported by legal principles, but we are not primarily concerned with that holding and therefore we shall not discuss it.*

THE FACTS WITH RESPECT TO THE POINTS ARGUED HEREIN

Disregarding the facts as to contemplation of death, with which we are not concerned, the facts with respect to the points herein argued are quite simple. As set out in the findings of the Tax Court (10 T.C. 962-7, R. 91-101), which we accept as correct, they are:

All the properties involved were reinvestments of properties originally acquired by the decedent as his separate property while he and his wife resided in Minnesota. The decedent and his wife came to California in 1922 and thereafter both resided in California until his death January 9, 1944. Shortly before and shortly after the move to California in 1922, decedent invested his assets in California real and personal properties, most of which were taken in the names of his wife and himself as joint tenants.† There is no question but that decedent intended a true joint tenancy and thus at that time transferred what was previously his separate property into ownership by his wife and himself as equal joint tenants.

On November 24, 1943, the decedent (assumed to have been acting in contemplation of his death) and his wife made an

*One other minor holding appears in the *Sullivan* case. This is that the taxable estate included the sum of \$2400 in a joint bank account, which entire amount decedent's wife checked out and deposited in another bank account in her own name shortly prior to decedent's death and without either his consent or his knowledge, so far as appears. We are not concerned with this issue nor shall we discuss it in this brief.

†We are only concerned with these joint tenancy properties and from here on will disregard the few properties which remained in the husband's own name and thus, aside from some special understanding, were his separate property at the time of the transaction in question.

agreement which recited that they desired to terminate the joint tenancies, and as the Tax Court said in its findings (10 T.C. 965; R. 97-8): "The contract then provided, with recited assignments to make it effective, that on and after the date it bore the real and personal property owned by them, whether held as joint tenants or in his or her own name, would be owned by them by undivided one-half interests as separate property." (see also R. 19-24, 187 and 189).*

The result of this agreement was that each of the various assets which had been held in joint tenancy was partitioned between the two spouses, each owning half as his or her separate property. The record shows that most of the properties were thereafter held by the decedent and his wife as equal tenants in common (R. 29, 35-7, 68-90 and 160-1). Four securities, aggregating a comparatively small part of the values involved, were agreed to be divided in kind, and they or their proceeds were subsequently divided between decedent's estate and the widow (R. 29, 37, 139-141, 204-8). Strictly speaking, only these four securities so divided in kind were really the subject of a true "partition"; as to all the other properties, the transaction was merely a transmutation from joint tenancy to tenancy in common and decedent and his wife each owned the same undivided half interest after this change as before—the only difference being that the possibility that either might take the

*The agreement itself was, of course, entirely sufficient to terminate the incident of survivorship without the subsequent deeds or assignments. It is settled that any agreement between joint tenants which is inconsistent with an estate in joint tenancy has the effect of terminating the joint tenancy and making the parties tenants in common.

McDonald v. Morley (1940) 15 C.2d 409,

where the joint tenants were husband and wife and the court held:

"* * * by their contract the parties specifically provided that if either one of them died, the interest of that one should not go to the survivor but to the daughter. This is entirely inconsistent with an estate in joint tenancy, which was thereby terminated. (*De-lanoy v. Delanoy*, 216 Cal. 23 [13 Pac.(2d) 513].) Thereafter, Mr. and Mrs. McDonald were tenants in common with separate descendible interests."

other's half on survivorship had been terminated. However, for convenience, we shall call this transmutation a partition or severance throughout this brief and we shall not hereafter take up separately the four securities divided in kind.

It should be mentioned that no question arises in the case with respect to the husband's half of the joint tenancy properties so partitioned to him. Such half remained his separate property until his death and was included in his taxable estate by his executor without question, not as a transfer under Section 811(c) but as property owned at death (R. 30-31). This tax controversy involves only the wife's half, owned by her both before and after the partition.

STATUTORY PROVISIONS

The provisions of the Internal Revenue Code in effect at the times of the transaction involved in this case and also at the date of decedent's death and referred to in this brief are quoted in the Appendix hereto. They include Sections 810, 811(a), (c), (d) (5), (e) (1) and (2).

ARGUMENT

I. The Correct Interpretation of the Applicable General Terms of the Federal Estate Tax Statutes Depends on the Substantive Rights of Decedent's Wife in the Joint Tenancy Properties Before and After the Transaction in Question; in the Case of California Property Owned by Husband and Wife as Joint Tenants, the Wife's Substantive Rights Amount to a Vested Half Interest Recognized Both by the Local Law, Which Governs Property Rights, and by the Federal Tax Law; Thus the Decedent's Wife Did Not Acquire Anything of Substance by the Partition of Properties.

Before discussing the provisions of the Federal estate tax statutes themselves, it is important to ascertain what the transaction in this *Sullivan* case did in the way of changing the basic rights of decedent and his wife. Therefore, we start with an analysis of the wife's rights in the joint tenancy properties before the transaction occurred. These rights depend, of course, on California property law.*

A. JOINT TENANTS ARE EQUAL CO-OWNERS, LIKE TENANTS IN COMMON, DURING THE LIFETIME OF BOTH.

The rights of the wife in joint tenancy property in California are well established and are generally the same as in the case

*We appreciate that the characterization of rights under local law cannot be finally controlling in the interpretation of a Federal tax law, such as Section 811. But where the questions under the Federal statutes are those raised by the wording of Section 811(c), namely, whether there has been a "transfer" and, if so, what "interest" has been transferred and for what "consideration," then the substance of what the transaction is becomes important, and that depends, of course, on the local property law. See, for example, the cases which passed on the constitutionality—and before that, the meaning—of the taxes on co-ownership properties at the death of the husband, such as tenancy by the entirety, joint tenancy and community property, namely, *Tyler v. U. S.* (1930) 281 U.S. 497; *U. S. v. Jacobs* (1939) 306 U.S. 363; and *Fernandez v. Wiener* (1945) 326 U.S. 340, which thoroughly canvassed the local law before applying the federal law, and which are further explained below in this Brief (pp. 34-39).

of joint tenancies in other jurisdictions. Disregarding for the moment the effect of death, i.e., survivorship, a joint tenancy between husband and wife in California constitutes each party the owner of an undivided half interest as his or her separate property, and not as community property.*

Siberell v. Siberell (1932) 214 Cal. 767;

Reiss v. Reiss (1941) 45 Cal. App. (2d) 740;

Conard v. Conard (1935) 5 Cal. App. (2d) 91;

Estate of Frary (1938) 26 Cal. App. (2d) 83.

Each of the joint tenants is therefore entitled to an equal share in possession of the property if it is of a type permitting such possession.

Estate of Gurnsey (1918) 177 Cal. 211;

Swartzbaugh v. Sampson (1936) 11 Cal. App. (2d) 451;

Noble v. Manatt (1919) 42 Cal. App. 496.

And if it is income producing property, each is entitled to one-half of the income received from third parties.

Estergren v. Sager (1940) 39 Cal. App. (2d) 401;

Swartzbaugh v. Sampson, above;

McWhorter v. McWhorter (1929) 99 Cal. App. 293.

Furthermore, since each half of the property is separate property, such income from the property belongs one-half to the husband and one-half to the wife as his or her separate income; this follows from the California cases first listed above.

The half interest of the wife as joint tenant is not confined to income, however. It is a one-half ownership of the capital or principal of the joint tenancy properties. Thus her half interest is liable for her debts and torts.

Meyer v. Thomas (1940) 37 Cal. App. (2d) 720.

*The effect of an understanding that the property is actually community property despite the fact that the record title is in joint tenancy is not considered in this Brief, as no such situation is involved in the *Sullivan* case.

And, conversely, the wife's half cannot be levied upon under an execution on a judgment against the husband alone, although the effect of such a levy may be to subject the husband's half interest to the judgment, thus severing the joint tenancy and making the purchaser on execution a tenant in common with the wife.

Pepin v. Stricklin (1931) 114 Cal. App. 32;
Young v. Hessler (1945) 72 Cal. App. (2d) 67;
Hilborn v. Soale (1919) 44 Cal. App. 115, 117;
Gwinn v. Commissioner (1932) 287 U.S. 224, 228.

A further demonstration of the wife's half ownership of the capital or principal of joint tenancy property is to be found in her right to sever the joint tenancy property. Either joint tenant can do this by conveying his or her half interest to a third party without the consent or knowledge of the other joint tenant and the grantee becomes a tenant in common with such other original joint tenant.

Delanoy v. Delanoy (1932) 216 Cal. 23;
Hiltbrand v. Hiltbrand (1936) 13 Cal. App. (2d) 330;
Reiss v. Reiss (1941) 45 Cal. App. (2d) 740;
Gwin v. Camp (1938) 25 Cal. App. (2d) 10;
Gwinn v. Commissioner (1932), 287 U.S. 224, 228;
Co-Tenancy, 7 Cal. Jur., Section 7, p. 338.

See, also,

Co-Tenancy, 14 Am. Jur., Section 14, p. 86.

The proceeds of any such sale by one joint tenant of his or her interest would, of course, be separate property of the seller under the cases first above cited making each half interest in joint tenancy property separate property rather than community property.

The wife's rights of severance, moreover, do not require that she sell the property. She has various means of obtaining her half interest in kind, destroying the joint tenancy character of

such half interest and converting it either into an undivided half interest as tenant in common or a physical half of the property. For example, the case of *Reiss v. Reiss*, above, holds that a transfer of a joint tenant's half interest to a trustee severs the joint tenancy (because it ends the fictional "unity of title" necessary to a joint tenancy). This means that the wife could transfer her half interest to a trustee for her sole benefit and still remain the equitable owner of the half interest but would thereby destroy the joint tenancy character and the husband's possibility of survivorship in her half. It is common practice, also, for her to sever the joint tenancy by conveying to a third party who then promptly re-conveys to her, with the result that she becomes tenant in common with her husband. She can also accomplish a physical division of the property by a partition suit in court.

California Code of Civil Procedure, Section 752;

Dando v. Dando (1940) 37 Cal. App. (2d) 371;

Partition, 20 Cal. Jur., Section 28, p. 614 and Section 66, pp. 653-4.

It should also be noted that if the husband sells his half or does an act of severance, this automatically confirms the wife's sole ownership of her half free of any interest of the husband or his purchaser, and she and the purchaser thereafter hold as tenants in common.

Delanoy v. Delanoy (1932) 216 Cal. 23;

Gwin v. Camp (1938) 25 Cal. App. (2d) 10;

Tilden v. Tilden (1927) 81 Cal. App. 535.

In view of these rights of each joint tenant, including the wife, the law requires little formality in a voluntary partition of joint tenancy property, and particularly where this consists of a division of it into two undivided interests held as tenants in common, which can be done merely by appropriate agreement or deed evidencing the intent of husband and wife to accomplish such result.

McDonald v. Morley (1940) 15 Cal.(2d) 409;

Gould v. Kemp (1834) 2 My. & K. 302; 39 Eng. Rep. 959;

Co-Tenancy, 14 Am. Jur., Section 14, pp. 86-87 and notes.

Such was the agreement in this case.

This brings us to the only difference between joint tenancies and tenancies in common, namely: that in case of the death of one co-tenant, the surviving tenant in a tenancy in common does not take the half interest of the decedent (unless by the will of the decedent or by inheritance), but only retains his prior half interest; while the surviving tenant in a joint tenancy not only retains his prior half interest, but becomes by virtue of the death the sole owner of the entire property under California law. However, this is not because the death constitutes a transfer of legal title to the survivor. Such title is deemed to have vested when the joint tenancy was created and the death is treated as merely relieving the survivor from the further possession, enjoyment and "interference" of the deceased joint tenant.* This is clearly expressed and prior cases to the same effect are discussed in

Estate of Gurnsey (1918) 177 Cal. 211, especially at pp. 215-217,

which was followed and approved by this Court in

Carter v. English (C.C.A. 9, 1926) 15 F.(2d) 6.

It is also to be noted that while the husband during his life-time does have, as incidents of his joint ownership, a share in possession and a possibility of survivorship, both affecting the wife's half interest as well as his own, she has the same incidents with respect to his half as well as her own, and each of

*The federal income tax cases recognize and apply this theory of the law, so that the income tax basis to a surviving joint tenant or tenant by the entirety is the original cost to the tenants, not the value at death.

Lang v. Commissioner (1933) 289 U.S. 109;

Carpenter (1932) 27 B.T.A. 282.

them can at any moment terminate the other's possibility of survivorship with respect to his or her own half by severance through one of the legal means already discussed, and also each tenant has legal means of terminating the other's share of possession in his or her own half, by a partition suit, for example.

B. THE FEDERAL GIFT TAX ATTACHES ON THE CREATION OF A JOINT TENANCY, AND THE INCOME THEREFROM IS TAXED EQUALLY TO THE TENANTS.

The substantive rights of the wife in joint tenancy property, above analyzed, are fully recognized for Federal tax purposes as long as both spouses remain living. In the first place, the wife is treated as having a vested half interest in the current income for income tax purposes and this is so clear that no litigation appears to have arisen on the question. The Internal Revenue Bureau has so ruled in

I. T. 3754 (1945) 1945 Cum. Bul. 143; and

I. T. 3825 (1946) 1946-2 Cum. Bul. 51,

and such rulings have never been questioned, the universal practice of the Commissioner being to tax the wife on half the income from such properties.

Furthermore, in the case of the Federal gift tax—which is intended to be *in pari materia* with the estate tax—the Commissioner of Internal Revenue has prescribed by regulation that it is the creation of the joint tenancy which constitutes a gift to the wife of her half interest when the property, as in this case, has previously been separate property of the husband. We refer to

Regulations 108, Section 86.2, subdivision (a), example (5),

which reads as follows:

"(5) If A with his own funds purchases property and has the title thereto conveyed to himself and B as joint owners, with rights of survivorship (other than a joint

ownership described in example (4)* of this section), but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of one-half the value of such property."

This regulation necessarily means that no gift of the wife's half interest occurs subsequently, when the wife severs and takes her half or when she obtains it by voluntary partition, because obviously there could not be two successive taxable gifts from the husband to her of her same half interest.

Even for estate tax purposes, the wife's right of severance or partition of joint tenancy property, whereby her half may be converted into property held as tenant in common, is recognized by cases holding that only one-half of the property held by husband and wife as tenants in common at the death of the husband is to be included in his estate notwithstanding the fact that the property may have been derived from joint tenancy property (or property held as tenants by the entirety) which would have been fully taxable if held until death.

Dennis (1932) 26 B.T.A. 1120;

Estate of Irwin A. Smith (1941) 45 B.T.A. 59.

To sum up this part of our brief, we believe that we have demonstrated that under California law the wife had a vested half interest in the properties in question before the transactions under discussion and that the effect of the partition transaction was not to vest this half interest in her, because that had already been done, but was only to sever her half and free it from the potentiality of survivorship of the husband and from his share in possession of the few securities divided in kind, although there was no change in the mutual sharing of possession as to the majority of the properties, which were converted into tenancy in common. We have also shown that

*Example (4) covers a joint bank account "where A can regain the entire fund without B's consent," not a true joint tenancy and not here involved.

these substantive rights of the wife and this effect of the transaction are generally recognized for Federal tax purposes. Therefore, we go on to a consideration of whether the express provisions of the estate tax statutes require that the wife's rights be disregarded.

II. If There Be a Transfer of an Interest in Property When Joint Tenancy Properties Are Commuted into Tenancies in Common or Partitioned Between the Owners, the Transaction Nevertheless Involves a Bona Fide Sale, with Adequate and Full Consideration on Both Sides, Within the Provisions of Section 811(c) and Is Therefore Excluded from Its Operation.

If, as we shall show under the next headings, the transaction between Mr. and Mrs. Sullivan, in so far as it related to the joint tenancy property, did not involve a "transfer" of any "interest" in property, obviously we are not concerned with the question whether there was a bona fide sale for an adequate and full consideration. It is plain, however, that if there were a transfer, it was upon a full and adequate consideration and for that reason is excluded from the operation of Section 811(c). We discuss here this phase of the case.

Assuming for the purposes of argument that there was a transfer of an interest in property, the question then is whether the transaction is excluded from the operation of Section 811(c) as "a bona fide sale for an adequate and full consideration in money or money's worth." In determining this question it is of critical importance that we have a clear picture in mind of exactly what the transaction was.

As stated at the outset we are here concerned only with the property which, prior to the contract between Mr. and Mrs. Sullivan of November 24, 1943, was held in joint tenancy by them. As to such property they were co-owners, each owning an undivided one-half of the property as his or her separate property. The rights of each—whether as to ownership, pos-

session, use, or otherwise—were identical. One of the incidents of that particular form of co-tenancy was the right of survivorship. With the minor exceptions explained above, all that they did by their contract, which changed their co-ownership from a joint tenancy to a tenancy in common, was to terminate this incident of survivorship. Each still continued to own an equal undivided one-half of the property as his or her separate property. The rights of each—whether as to ownership, possession, use, or otherwise—continued to be identical. The one and only thing they did was to put an end to the right of survivorship—and even this was done equally and what each gave up was identical with what the other gave up.

As to most of the property this was not only what the parties did, but it was *all** that they did. The deeds and other instruments executed by them were merely for the purpose of establishing, as the contract itself provided (R. 9), the results of the agreement of record. We do not believe that the result is any different as to the four securities that were divided in kind.

It is this transaction that the Tax Court has said was a transfer of property by the decedent and yet was not “a bona fide sale for an adequate and full consideration in money or money’s worth.” If, as we shall show was the fact, the transaction was not a transfer at all, obviously it was not a sale. But if a transfer can be worked out under the facts in order to support the tax under Section 811(c)—and under this heading of our brief we are proceeding, for the purposes of argument, as though it could be—we respectfully submit that such transfer is squarely within the clause of Section 811(c) excluding from its operation a sale for a full and adequate consideration.

Where, as here, what one of the parties gave or transferred to the other was not only equal to, but also identical with, that which the other gave or transferred in return, it would seem axiomatic that the sale was for a consideration that was neces-

*All emphasis throughout this brief, both in text and in quotations, is ours unless otherwise expressly noted.

sarily full and adequate, so as to remove the question from the realm of reasonable debate. What, then, is the Tax Court's argument to the contrary? The Tax Court attempts to make three points, which we take up separately and in order.

A. A BONA FIDE SALE UNDER SECTION 811(c) DOES NOT REQUIRE ARM'S LENGTH BARGAINING OR OTHER ELEMENTS SUGGESTED BY THE TAX COURT.

The first argument advanced by the Tax Court is—

"We do not, in the first place, find here the characteristics of a bona fide sale in the transaction. The transfers, as already pointed out, had their inception in a desire, obviously mutual, to lessen death duties while contemplating death. No bargaining at arms' length, or otherwise, appears. The petitioner concedes that the interest of the survivor was acquired by her in the first instance by a gift from the decedent. Neither does it appear that either party gave any thought to whether he or she was receiving value, adequate or inadequate, for property interests transferred. The nature of the transaction and its purpose was one that did not contemplate anything more than reciprocal transfers without regard to consideration of any kind. It was simply a family arrangement for the protection of their estates, as they regarded them." (R. 107)

The argument here is without substance in every particular, as we now propose to show. It is first said that "The transfers, as already pointed out, had their inception in a desire, obviously mutual, to lessen death duties while contemplating death." This fact, assuming it to be the fact, may justify the Tax Court's conclusion that the transaction was in contemplation of death, but it certainly has no bearing whatever on the question whether the transaction was a bona fide sale. The mere fact, if it be the fact, that the transaction was in contemplation of death does not, either as a matter of law or as a matter of fact, indicate that the transaction was not bona fide or that it was not a sale. A simple illustration suffices. Suppose a man on his deathbed

realizes that his property is primarily real property and when death comes he will not have sufficient liquid assets to pay taxes, for which reason and in contemplation of death he sells some of his property at fair market value for cash. The transaction is in contemplation of death and has for its purpose taking care of death taxes, but no one would even suggest that it is not a bona fide sale.

It is next said that "No bargaining at arms' length, or otherwise, appears." When, may we ask, has it been essential to a bona fide sale that there be any bargaining? I buy my morning's paper from a newsboy, but we do not bargain "at arms' length, or otherwise" about it,—and yet no one would deny that a bona fide sale takes place. So, too, when I go into a drug store and buy a tube of shaving cream. So, too, of a thousand and one purchases made every day in almost every store in the land. Indeed, in the ordinary transactions of life for everyone of us a sale that involves bargaining "at arms' length, or otherwise," is the exception and not the rule. And where, as in this case, it is perfectly obvious to anyone that each party is giving and receiving equal value, what need is there for bargaining procedures?

It is next said "The petitioner concedes that the interest of the survivor was acquired by her in the first instance by a gift from the decedent." What possible bearing, it may be asked, can this have on the question whether the subsequent transaction was a bona fide sale? Suppose, for example, Mr. Sullivan had given her some cash twenty years ago and she now uses this to buy property from him. Obviously, the transaction would be a bona fide sale notwithstanding the original gift. How Mrs. Sullivan acquired her original interest in the property is an entirely false quantity in determining the character of the subsequent commutation of the co-ownership from joint tenancy to tenancy in common.

It is next said

"Neither does it appear that either party gave any thought to whether he or she was receiving value, adequate or in-

adequate, for the property transferred. The nature of the transaction and its purpose was one that did not contemplate anything more than reciprocal transfers without regard to consideration of any kind."

To this there are two answers. The quoted statements gratuitously assume, without any support whatever in the record, that the parties did not understand what they were doing. If they understood the transaction at all, each of them inevitably must have known that what he or she was "transferring" was not only equal to, but identical with, that which he or she was receiving. But more than this—so far as consideration is concerned it made not a particle of difference what the parties may have known or thought. The matter of controlling importance is not what they thought or knew about the consideration, but whether in point of actual fact the consideration was full and adequate. If it was—and it necessarily had to be when what passed to each from the other was identical—it would have made no difference had the parties supposed or thought otherwise. The statute is not concerned with the parties' views of adequacy, but solely with adequacy in fact, which manifestly existed here.

And finally it is said "It was simply a family arrangement for the protection of their estates, as they regarded them." This remark is, at best, but a foggy one, but so far as it means anything it in no wise supports the position of the Tax Court. Many a sale is made by persons "for the protection of their estates" and that purpose certainly does not prevent the transaction from being a sale. If it is meant to be suggested that the transaction was not "bona fide"—i.e., that it was a sham and not real,—there is neither finding nor record evidence in support. Everything shows that the contract of November 24, 1943 was made and carried out in good faith.

B. THE WORDS "BONA FIDE SALE," AS USED IN SECTION 811(c), INCLUDE TRANSACTIONS THAT MAY BE REGARDED AS EXCHANGES, AS WELL AS SALES FOR MONEY.

The second point made by the Tax Court is stated thus:

"Moreover, the division of the joint property into interests in common was not sale, in the ordinary sense in which we think the statute used the term. The word 'sell'—in its ordinary sense means a transfer of property for a fixed price in money or its equivalent. *United States v. Benedict*, 280 Fed. 76, 80, quoted in *Hale v. Helvering*, 85 Fed.(2d) 819. No price was fixed here. It will be noted that section 811(c) does not include 'exchange'; and the most that could be said of the division of the joint estates would be that it was in a sense exchange."

The essence of the point thus attempted to be made is that the "transfer" between Mr. and Mrs. Sullivan was an "exchange," which is not included in the phrase "a bona fide sale" used in 811(c). The answer is the simple and direct one that such is not the law.

Apparently, the Tax Court is here proceeding upon the assumption that in order to have a "sale" the price must be "fixed"—i.e., stated—in money or in terms of money. This is much too narrow a view of the term "sale" as used in the context of Section 811(c).

First, the position taken by the Tax Court that there must be a "fixed price" flatly ignores the language of the statute itself. The sales referred to in Section 811(c) are those for a consideration "in money or *money's worth*." Obviously, the words "money's worth" indicate that the word "sale" includes transfers where the consideration is something other than money—i.e., property having a money value—and this is exactly what an "exchange" is. There is nothing in the statute that says that the "money's worth" must be fixed or stated. Moreover, the Tax Court's argument ignores Section 811(i), which provides:

"(i) Transfers for Insufficient Consideration.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the *value* of the consideration received therefor by the decedent."

This language shows unmistakably that the consideration constituting "money's worth" may be property other than money itself, which is precisely the case at bar if it be assumed that there was a transfer by the decedent. It is to be noted that the statute speaks of the "value" of the consideration, rather than the "amount," which necessarily contemplates that the consideration may be property instead of money.

Second, the question of what constitutes "a bona fide sale," not taxable as a transfer in contemplation of death, arose years ago in connection with the relinquishment of a wife's inchoate right of dower or her interest in the estate of her husband and the law was clearly laid down contrary to the Tax Court's present holding. In

Ferguson v. Dickson (C.C.A. 3, 1924) 300 Fed. 961,
cert. den. 266 U.S. 628,

the decedent transferred certain securities in trust for the benefit of his intended wife, with the income payable to himself so long as he lived, in consideration of which she relinquished her inchoate right of dower. The Commissioner contended, just as he has here, that the transfer was in contemplation of death and was not "a bona fide sale" within the meaning of Section 402(c) of the Revenue Act of 1918, the predecessor of 811(c). The Court of Appeals for the Third Circuit went right down the line against the Commissioner, saying (p. 963):

"Many courts have defined a legal sale:

"It is 'a transmutation of property from one man to another in consideration of some price.' 2 Blackstone, 446; *Dunn v. Mayo Mills*, 134 Fed. 804, 810, 67 C.C.A. 450. 'A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent.' Five Per Cent. Cases, 110 U.S. 471, 478, 4 Sup. Ct. 210, 214 (28 L.Ed. 198). 'A sale is a contract by which, for a consideration, one transfers to another property or an interest therein.' *Yick Sung v. Herman*, 2 Cal. App. 633, 83 Pac. 1089, 1091. 'A sale is a contract whereby one acquires a property in the thing sold and the other parts with it for a valuable consideration.' *Cole v. Laird*, 121 Iowa, 146, 96 N.W. 744. 'Every transfer of property for an equivalent is practically and essentially a sale, and * * * money's worth is a valuable consideration [for the sale] as much as money itself.' *Huff v. Hall*, 56 Mich. 456, 23 N.W. 88.

"The intended husband transferred to the trust company, for the benefit of the intended wife, the property out of which she was to receive a certain interest. The exact amount which she would receive was dependent upon the happening of some one of the various contingencies set out in the contract. In return for this new property right, she absolutely extinguished her inchoate right of dower in everything that he then had or might thereafter acquire.

"We think that this transaction constituted a sale. The husband absolutely sold his right in the securities as defined and limited in the contract and the intended wife purchased them with the property constituting her inchoate right of dower. Her dower rights in all his property and his rights in the securities within certain limits, which would inevitably become definite, were gone forever."

The court further held that the sale was for a fair consideration in money or money's worth and that therefore the transaction was not taxable under Section 402(c) as a transfer in contemplation of death.

The same result was reached in

McCaughn v. Carver (C.C.A. 3, 1927) 19 F.(2d) 126.

It is true that these decisions were *legislatively* reversed on the second ground by later amendments to the revenue laws. The significant point is that they were reversed, not by providing that the transactions involved were not bona fide sales, but by changing the definition of the required consideration and by providing expressly (now in Section 812(b)) that a relinquishment or promised relinquishment of dower, curtesy or other marital rights in the decedent's property or estate shall not be considered to any extent a consideration in money or money's worth. The cases show that a transfer of property interests in consideration of a relinquishment or transfer of property rights constitutes "a bona fide sale" within the meaning of the statute. And it hardly need be added that here, in the *Sullivan* case, we are not dealing with dower, curtesy or other marital rights.

Nor do the cases cited by the Tax Court indicate a contrary result. In

United States v. Benedict (C.C.A. 2, 1922) 280 Fed. 76,
aff'd (1923) 261 U.S. 294,

one of the questions was whether the power given to a trustee "to sell" included the power to convey to the City of New York for street purposes in consideration of exemption of the remaining land from assessment. While it is true that the court there said that the word "sale" "in its ordinary sense means a transfer of property for a fixed price in money or its equivalent," the significant fact is that the court went on to hold that in the context the word "sell" had a much broader meaning and included the conveyance made by the trustee, which was solely in consideration of an exemption of the remaining lands from assessment. In the other case cited by the Tax Court,

Hale v. Helvering (App. D.C. 1938) 85 F.(2d) 819,

the question was whether a settlement with the maker of certain promissory notes for less than face was a "sale" or "exchange" of a capital asset, giving rise to a capital loss deduction, and the court held that it was neither. While, as the Tax Court

points out, the Court of Appeals quoted the above language from the *Benedict* case, it is worthy of note that it also quoted the following from *Black's Law Dictionary*, which is entirely pertinent here:

"The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money which is but the representative of value of property."

In view of the decisions above dealing with the exact question of the meaning of the word "sale" as used in connection with transfers in contemplation of death, it would hardly seem necessary to go afield for cognate decisions, but the cases, including the tax cases, are many that hold that the word "sale" includes transfers that might equally be regarded as exchanges.*

An example should suffice to complete the demonstration of this point. On his deathbed and in contemplation of death a businessman transfers his business, which has a fair market value of \$200,000 but which requires constant management, to his brother in exchange for \$200,000 of marketable securities belonging to his brother, who has acquired the securities from his own earnings. Is the decedent's estate to be taxed on both the \$200,000 of securities received on this exchange and still held at his death, and also on the \$200,000 value of the business transferred to the brother in consideration for the securities, because this exchange is not a "sale" under Section 811(c)? Obviously Congress intended no such doubling of the estate tax but considered this type of transaction to be a "sale."

*As illustrative, see

Helvering v. Syndicate Varieties (App. D.C. 1944) 140 F.(2d) 344;

Gruver v. Commissioner (C.C.A. 4, 1944) 142 F.(2d) 363.

It is submitted that the transaction here, if a transfer at all, was "a bona fide sale" within the meaning of those words as used in Section 811(c).

C. THE REQUIREMENT IN SECTION 811(c) OF "AN ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH" IS MET WHERE THE CONSIDERATION MOVING IN EACH DIRECTION IS IDENTICAL. SUCH CONSIDERATION IS NOT INADEQUATE BECAUSE, FOR OTHER REASONS, THE TRANSACTION RESULTS IN A SAVING OF ESTATE TAX.

The final point made by the Tax Court is this:

"* * * Nor was the transaction for the necessary consideration. Assuming that the division of interests had such reciprocity as to constitute a good consideration between the parties, we think it was not the adequate and full consideration in money or money's worth intended by the statute. A sale for full adequate consideration in money or its worth would not diminish the estate of the transferor, but leave it in effect the same as before, therefore, such a sale would be unobjectionable to the estate tax law.

* * *

"* * * Here it seems clear that for estate tax purposes the decedent's estate was diminished for he surrendered for the purposes of estate tax law more than he received, because, as the parties have stipulated that in the absence of the transfer here involved, the entire joint estate would be taxable under the provisions of section 811(e), whereas, under the transfer or agreement made he received only a half interest, by tenancy in common, and therefore only that amount would be taxable estate." (R. 108, 109)

The concept of the Tax Court here is that though the consideration passing in each direction is not only equal, but absolutely identical, it is yet not full and adequate because the result is a tax saving.* It must be obvious that the Tax Court

*It is, perhaps, worthy of note that if there was any exchange here at all the decedent did not transfer property owned by him outright in exchange for the wife's relinquishment of an expectancy. What actually took place was that each extinguished his or her expectancy of taking the share of the other by survivorship.

has confused adequacy of consideration with taxability. There is no warrant for the conclusion thus reached.

It is to be noted that the Tax Court does *not* say—nor could it possibly say—that, treating the transaction as a transfer, what passed to the decedent, Mr. Sullivan, was not fully equal to that which passed from him to Mrs. Sullivan. Inasmuch as the interests that passed in each direction, if any did pass, were absolutely identical, obviously there could be no finding of inequality and such a finding, if made, would be without support either in law or in fact.

The position of the Tax Court is, therefore, that although the consideration moving to the transferor is equal to and identical with that which he transfers, under Section 811(c) the consideration is still inadequate if the result would be a tax saving. In other words, though decedent's *actual* estate is in no respect reduced, if the *taxable* estate is reduced then the consideration is inadequate. It is demonstrable that this is not so and it is equally demonstrable that the difference in tax result is due, not to any inadequacy of the consideration for the property transferred, but to the fact that Congress has seen fit to tax joint tenancies differently from tenancies in common and the Tax Court has completely overlooked this fact. We proceed to that demonstration.

Let us suppose that A is on his deathbed and knows that he has but a short time to live. He realizes that he must put his house in order. His entire estate consists of real property which he holds in joint tenancy with his wife, the entire property being worth \$200,000. In contemplation of death and with the sole motive of providing his estate with liquid assets when he dies, he sells his undivided half interest in the realty to a real estate dealer for \$100,000 in cash. He then dies. We apprehend that neither the Commissioner nor the Tax Court would have the fortitude to contend that because the taxable estate is, by this action, reduced from \$200,000 to \$100,000, therefore the consideration was inadequate, nor would we be

apprehensive of the position this Court would take if any such contention were made. The reason the taxable estate has been cut in half is, not that the consideration was inadequate (because *ex hypothesi* the full value of decedent's interest was paid for in money), but because Congress has seen fit to tax joint tenancies differently from tenancies in common and, by selling his interest for cash, A ceased to hold any property in joint tenancy. This he was free to do, if it suited his purpose.

Indeed, the result would be exactly the same had A's motive for selling been, not to obtain liquid funds for his estate when he should die, but to avoid the tax results of holding property in joint tenancy.*

One further example should demonstrate the fallacy of the Tax Court's reasoning. Suppose H and W held as joint tenants Blackacre, having a fair market value of \$100,000, the consideration for the acquisition of which was derived entirely from H's separate property, and, in addition, H held in his own name Whiteacre, having a fair market value of \$50,000, which was his own separate property. In contemplation of death, H transfers to W Whiteacre in exchange for her interest in Blackacre. If the Tax Court be right in its decision in this case, it would have to hold that this exchange was not for a "full and adequate consideration," even though the joint tenancy had been created many years before and not in contemplation of death, and even though the fair market value of the *severable* half interest of W

*"It has been held from an early date that a taxpayer has the legal right to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits. *United States v. Isham*, 17 Wall. 496, 506, 21 L.Ed. 728. The principle was reaffirmed in *Gregory v. Helvering*, 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355, was recently restated in *Commissioner v. Tower*, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670, 164 A.L.R. 1135, and has been applied in numerous Circuit Court of Appeals cases. As was said by this court speaking through Judge Hickenlooper in *Marshall v. Commissioner*, 57 F.2d 633, 634: 'There was nothing unlawful, or even mildly unethical, in the motive of petitioner, to avoid some portion of the burden of taxation.'"

United States v. Cummins Distilleries Corporation (C.C.A. 6, 1948) 166 F.(2d) 17, at 20.

in the joint tenancy property was fully equal to the fair market value of Whiteacre. The Tax Court in the hypothetical case given would have to say that W's severable one-half interest in Blackacre was not "full and adequate consideration" because it would have been included in H's estate but for the indicated transaction. It is impossible, we submit, either in the hypothetical case or in the instant case to conjure out of the plain words "full and adequate consideration" any such strained, unnatural and fanciful meaning.

Nor do the cases cited by the Tax Court, when considered in the light of their facts, hold otherwise. The first case cited is

Latty v. Commissioner (C.C.A. 6, 1933) 62 F.(2d) 952.

There the decedent made an agreement with his daughter that in consideration of her agreeing to make no claims against him during his life or against his estate after death for support, maintenance or distribution he would create a \$50,000 trust for her, either inter vivos or upon his death, in the meantime paying her 5% interest on that sum. The decedent not having set up the trust before death or provided for it in his will, his executrix paid the daughter \$53,381.55 in satisfaction of the obligation and sought to take this amount as a deduction under a contract made for fair consideration in money or money's worth. The court held that, assuming the agreement to have been binding,

"* * * it was in fact and in substance an agreement upon the father's part *to make a bequest for the use of his daughter*, and that as such it was a claim to a distributive interest in the estate and not a claim against the estate within the meaning of Section 303."

It is true, as the Tax Court points out, that the court further held that for a contract claim to have been incurred for a fair consideration in money or money's worth so as to be deductible it should appear that the consideration either augmented the estate of the decedent or granted the decedent some right or privilege he did not possess before or operated to discharge a

then existing claim. The reason is, of course, clear. The tax saving in the *Latty* case, had there been one, would have arisen, not because the decedent, having a choice between two alternative courses, chose the one producing the lesser tax, but only because the consideration for his contract promise was inadequate—i.e., was of a value less than the amount the decedent promised to transfer in trust. Accordingly, it was appropriate for the court to say that the consideration there, to be adequate, must augment the estate. This does not mean, nor is there anything in the opinion that even suggests, that where, as in the *Sullivan* case, the consideration was not only adequate but identical with that which the decedent transferred, it is yet to be said to be inadequate because the transaction, for entirely different reasons (i.e., the difference in method of taxing joint tenancies and tenancies in common), resulted in a tax saving.

The case next cited by the Tax Court,

Commissioner v. Porter (C.C.A. 2, 1937) 92 F.(2d) 426,

is even less in point. In that case the decedent guaranteed certain loans which a bank made to his son-in-law. At one time the collateral deposited with the bank by the son-in-law was adequate, but it later became inadequate. After decedent's death the bank foreclosed the collateral, and this being insufficient, the bank called upon the decedent's executors to make good the guarantee, by reason of which they paid the bank \$75,000, the amount of the guarantee. Efforts to collect from the son-in-law proved unavailing. The executors claimed a deduction of \$75,000, which the Commissioner disallowed on the ground that the contract of guarantee was not supported by full and adequate consideration. The Board of Tax Appeals held that the statute did not require that the consideration should move to the decedent; that it was in fact adequate; and that the amount paid was deductible; and the Court of Appeals affirmed. It is true that the court said, as the Tax Court points out, that the purpose of the requirement of a full and adequate consideration is "to prevent a man from diminishing his taxable estate by

creating obligations not meant correspondingly to increase it, but *intended as gifts or a means of distributing it after his death*," but obviously this language has no application whatever to the facts of the *Sullivan* case. The court went on to point out that, at the time of the guarantee, the decedent received as consideration in return a subrogation right against the son-in-law who was not shown to be insolvent, and the mere fact that this right later became valueless did not defeat the deduction. When analyzed, the case supports, not the Tax Court, but our position that where the tax saving results, not from the inadequacy of the consideration, but from other factors the saving is not to be denied by a thinly guised claim that the consideration was inadequate.

The case of

Helvering v. Robinette (C.C.A. 3, 1942) 129 F.(2d) 832, aff'd 318 U.S. 184,

on the Tax Court's own statement of it, is not even remotely in point. The Tax Court says that the case shows that, for gift tax purposes, "an exchange of promises *relative to testamentary dispositions* is held not to be adequate and full consideration in money or money's worth." Obviously, mutual promises by a mother and daughter to make gifts to others, even if deemed supported by common law consideration, do not change the transaction into one other than that of making gifts which are subject to the gift tax. But we do not have any such facts, or any comparable facts, in the *Sullivan* case. The *Robinette* case does not even suggest, much less hold, that where identical property interests move in each direction on a transfer there is any room for the Commissioner to contend that the consideration is yet inadequate.

Nor can a comparable situation be found in the final case cited by the tax court on this point—

Phillips v. Gnichtel (C.C.A. 3, 1928) 27 F.(2d) 662, cert. den. 278 U.S. 636.

There a husband and wife, each owning property of large value, formed a family corporation and transferred the property to it, the husband taking 51% and the wife 49% of its stock. The husband was about to die and his doctor had so advised him. Pursuant to a mutual understanding the husband and wife created reciprocal trusts, the income from the wife's trust being payable to the husband for life and the income from his trust being payable to her for life, with remainders over to their children. Confessedly this was done in contemplation of death and two months later the husband died. The court held, and apparently very properly, that the transaction was in no sense an even business exchange or sale, but was very obviously an arrangement in the nature and having the effect of a testamentary disposition that was taxable as a transfer in contemplation of death. Manifestly, unlike the *Sullivan* case, what the decedent received was (in view of his very short life expectancy) in no respect equal in value to the property he transferred in trust.

We forebear pressing the argument further. It is one thing for the courts to use language about diminishing the taxable estate where, under the facts, that comes about because the consideration received by the decedent was inadequate (i.e., was of a value less than that which he gave), but it is an entirely different thing for the Tax Court, as it has done in this case, to wrest such language from its context and attempt to apply it to a case where the tax saving is due, not to any inadequacy or non-equivalence of consideration, but to the fact that the taxpayer has chosen a form of property ownership which Congress has taxed less severely than the form of ownership in which the property was previously held. What the Tax Court is doing in practical effect, though not in form, is denying the taxpayer the choice which Congress has deliberately left open to him. It should not be necessary to advert to the fact that the Tax Court has not been vested with legislative powers and, until it is, it must be content with the law as laid down by Congress.

III. The Wife's Half of the Joint Tenancy Property Involved in Commuting the Property into Tenancies in Common or Partitioning It Between the Owners Is Not Includible in Decedent's Gross Estate Under Section 811(c) Because Section 811(c) Requires That the Property Sought to Be Included in the Gross Estate Must Have Been Transferred by the Decedent and the Commutation or Partition Is Not a "Transfer" by the Decedent of the Wife's Half Interest in the Joint Tenancy Property.

In this case the Tax Court held that Section 811(c) applied to the wife's half of the joint tenancy properties taken by her in the partition.* Therefore, the Court necessarily held that all of such half was an "interest" of which *decedent* made a "transfer" in contemplation of death, because Section 811(c) requires the inclusion of property in the gross estate only "to the extent of any interest therein of which the decedent has at any time made a transfer * * * in contemplation of * * * death." Strangely enough, however, there is no discussion in the Tax Court's opinion of whether or not a transfer was involved or, if so, what the extent of the interest transferred actually was. The Court seems to have simply taken it for granted that these requirements of Section 811(c) were present, and then, on this assumption to have concluded that it could ignore the partition and treat the property as still held in joint tenancy at decedent's death, thus including all of it in his taxable estate under Section 811(e) (1) (see 10 T.C. at 973, R. 112).

In the first place, there can be no doubt that a transfer is essential under Section 811(c). It is only when there is a transfer that the language of the section can apply; and the authorities recognize the necessity of a transfer. Thus it is said in

1 *Paul, Federal Estate and Gift Taxation*, Section 6.04:
 "It is also implicit in the statute that the decedent must

*By "partition" we mean, as already indicated above, the transmutation of most of the properties into tenancy in common by the agreement of November 24, 1943, between decedent and his wife.

have made a transfer. And a transfer must have been of property owned by the decedent."

The following statement is also made in

Montgomery's Federal Taxes—Estates, Trusts and Gifts,
1947-48, page 437:

"* * * Obviously the decedent must have transferred property during his life in order for the statute to be invoked."

And cases involving transactions which are found not to be transfers hold that such transactions are not reached by Section 811(c), although they may have the effect of freeing property from rights of the acting party. Thus in

Brown v. Routzahn (C.C.A. 6, 1933) 63 F.(2d) 914;
cert. den. 290 U.S. 641,

a surviving husband's renunciation of a one-third interest in his wife's estate, which she had bequeathed to him by her will, was sought to be taxed under a forerunner of Section 811(c) containing the same wording in all important respects, but the Court held that the renunciation could not be so treated because the mere refusal of decedent to take under the will was not a transfer. Similarly, the exercise or release of a power of appointment created by a third person was held not to be a taxable transfer under the analogous wording of the gift tax law, Section 1000(a), which also required a "transfer."*

Clark (1942) 47 B.T.A. 865 (Acq. by Commissioner,
1942-2 Cum. Bul. 4);

Grasselli (1946) 7 T.C. 255 (Acq. by Commissioner,
1946-2 Cum. Bul. 2).

This brings us to the basic question here, namely, whether the wife's half of the properties (previously in joint tenancy)

*After these cases arose, Section 1000(c) was added to provide specifically that the exercise or release of such a power was to be treated as a transfer for gift tax purposes, but they still have the same force in demonstrating the necessity of a true transfer, not some other act, when the statute requires a "transfer."

which came into her separate ownership by reason of the partition, was acquired by her by means of a "transfer" from her husband made at the time of and by means of the partition. Of course, there can be no doubt that when she obtained her original half interest in the joint tenancy properties, she did so by reason of a transfer from her husband, but this had occurred around 1922, and such transfer could not come under Section 811(c) because the Commissioner makes no claim that it was done in contemplation of death and because it occurred many years prior to the two-year period of presumptive contemplation of death. It is, therefore, only the partition on November 24, 1943 which must be considered.

Certainly no one would contend that there is a "transfer" by the husband when his wife obtains a severance or partition of joint tenancy property by sale of her half or by court proceedings or other legal means without any participation or consent by the husband. Is the situation any different, then, when she takes her half under a voluntary partition agreement followed by confirmatory deeds and assignments which merely recognize and quitclaim her pre-existing right to the division?*

It seems obvious that there is no true transfer to the wife in such a partition. This is not only because she owns before the partition in substance exactly what she owns after the partition, but also because she continues to hold her half *by reason of her right to take it* and not by reason of her husband's participation in the partition.†

*See footnote at page 4 *supra*.

†The United States Supreme Court has already recognized that "until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax . . ." under Section 811(e) which taxes property held in joint tenancy at death. *U. S. v. Jacobs*, 306 U.S. 363, 371. Inasmuch as the wife joined in the severance herein, she did exactly what the Supreme Court said she might do to escape the tax. If she had acted alone, instead of in concert with her husband, surely no one would argue that she had made a "transfer." His action was not a prerequisite to the severance nor did it nullify her action, which, as the Supreme Court said, was an appropriate means of avoiding the tax.

A partition is not in ordinary parlance or in common sense a transfer of any substantial interest from one co-owner to another. It is rather a taking by each owner of what he previously owned or had the right to take. No one ordinarily thinks of it as involving any transfer, much less a gift. It is fundamentally a simple concept. A mother tells her twin children, "Boys, there is a piece of pie for you on the kitchen table," and the twins, having reached that civilized age at which they recognize each other's rights, proceed to cut the piece in half and each takes half. In such a case of partition, neither one of the twins nor the mother is aware or would believe that either boy has transferred anything to the other or has received anything from the other; on the contrary, they all consider that each twin has merely taken what belonged to him.

And this common understanding of the most simple partition is recognized by the authorities as equally true of legalistic partitions by court proceedings or voluntary action. As stated in

Partition, 20 Cal. Jur., Section 66, pp. 653-654,

"At common law a judgment of partition making allotments operates to vest in each tenant a sole estate in his allotment, but nothing further is effected thereby than the affirmance or ascertainment of the possession. Although the effect of the judgment now is determined by the statute, it is settled in harmony with the common-law rule that the judgment has no other effect than to sever the unity of possession and community of interest, *and that it does not vest in either of the tenants any new or additional title, nor affect the character of their title in any other respect*, unless expressly so declared. *The judgment merely divides and apports the pre-existing rights and estates, transforming the right of common possession into a right to the exclusive possession of a proper interest or share in severalty; and each party thereafter holds in severalty that interest which he previously held in undivided form, under the same title and subject to the same obligations, covenants and contracts as before.* * * *

"A voluntary partition, effected by an interchange of deeds, produces the same result as a judgment in partition."

But on the present question, the most important authorities to the effect that no transfer is involved consist of a line of United States Supreme Court decisions which hold that the change in *the wife's half interest* in joint tenancy property and analogous co-ownerships which occurs when she becomes the sole owner of her previously vested half interest does not constitute a *transfer* to her of that half but rather is merely an *accession* to her of full possession and control and of freedom from interference of the other tenant and may thus support an excise tax expressly directed at such accession, but does not support a transfer tax. We refer to the decisions upholding the Federal estate tax expressly levied on properties held at the time of the husband's death in tenancy by the entirety, joint tenancy, and as community property, namely,

Tyler v. United States (1930) 281 U.S. 497;

United States v. Jacobs (1939) 306 U.S. 363;

Fernandez v. Wiener (1945) 326 U.S. 340.

The difficult question in each of these cases was whether *the wife's half* of the property, freed to her by the husband's death, could be included in the husband's taxable estate. In the first two cases the statutory forerunner of Section 811(e)(1) was involved and the types of co-ownership were tenancy by the entirety in the *Tyler* case and true joint tenancy in the *Jacobs* decision. The *Fernandez* case tested the constitutionality of the comparable Section 811(e)(2), added by the 1942 Revenue Act, and the property was Louisiana community property. In each case the tax was held constitutional as applied to the wife's half interest.

In each of the three cases the Supreme Court was concerned with the tax on *the wife's half* of the property as either the sole or the primary question involved; and it was the tax on *her half* alone which caused real difficulty for the Court because of the obvious absence of any transfer as a basis for the tax. The husband's half was not involved in the *Jacobs* case, because both the District Court and the Circuit Court of Appeals had

included it in the gross estate and the taxpayer respondent did not appeal from this, but conceded that the husband's half was taxable under the forerunner of Section 811(e). Similarly, in the *Fernandez* case the husband's half was not involved because the Louisiana community property law made the husband's half pass upon his death, not to the wife, as such, but to his heirs or under his will as an ordinary transfer by operation of law. In the companion cases reported as *Tyler v. United States*, above, involving tenancies by the entirety, each taxpayer was questioning a tax on both the husband's half and the wife's half on the ground that under the common law fiction of unity of title, the whole title was vested in the wife at the inception of the ownership and therefore even the husband's half was not transferred to the wife on the husband's death. But if only the husband's half had been involved, it seems clear that the Supreme Court would not have had any difficulty in finding a true transfer. The Court was not bothered by the common law theory of unity of title, for after describing this "amiable fiction of the common law," the Court said at 281 U. S. 503:

"* * * This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. * * *"

Obviously, the effect of the husband's death on each tenancy by the entirety involved in the *Tyler* case was to terminate the husband's real half ownership of the property. Indeed, as pointed out in the later discussion of the *Tyler* case and other early cases in the *Jacobs* opinion and footnotes at 306 U.S. 367-8, the Supreme Court had already held in *Gwinn v. Commissioner* (1932), 287 U.S. 224 and *Griswold v. Helvering* (1933) 290 U.S. 56, that a prior Federal estate tax statute which had been construed as not retroactive, so as not to tax transfers completed before its adoption, was, nevertheless, to be considered as properly taxing prospectively the husband's half—but not the wife's half—of joint tenancy property where the

property had been transferred into joint tenancy before the adoption of the statute, but the husband died after such adoption.* The basic reason for this was, of course, that in all substance the husband's half passed to his wife at his death rather than at the inception of the joint tenancy.

Thus it was the wife's half which caused the real difficulty for the Court in the *Tyler* case, and the only problem in the *Jacobs* and *Fernandez* cases. In the *Tyler* case it was undoubtedly because the wife's half was involved that the Court observed at 281 U.S. 502 that Section 201 (the forerunner of Section 810)

"* * * imposes the tax 'upon the transfer of the net estate'; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute. But §202 [the forerunner of Section 811(e)(1)] definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present."

And, similarly, in the *Jacobs* case, in which the husband's half was not involved at all, the Court said, quoting in part from the *Tyler* opinion (306 U.S. at pages 367-8):

"* * * Congress has the power to levy a tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a co-tenant. In holding that the full value of an estate by the entirety may constitutionally be included in a decedent's gross estate for estate tax purposes, this Court said: 'The question * * * is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit),

*The *Gwinn* case was not a husband-and-wife joint tenancy, but the *Griswold* case was, and it involved the exact situation described in the sentence of the text to which this note refers.

to be measured, in whole or in part, by the value of such rights * * *.

"'At * * * [the co-tenant's] death, however, and because of it, * * * [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite *accessions* to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax.'" (Citing in footnote 7 "*Tyler v. United States*, 281 U.S. 497, 503, 504.")

In the same opinion in the *Jacobs* case, the Court also said, in recognition of the wife's vested half interest (306 U.S. 371):

"* * * *Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit. This termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax.*"

Finally, in the *Fernandez* case substantially the present Supreme Court made it clear that the wife's half of Louisiana community property was not to be taxed at the husband's death on any theory that it was then transferred to the wife. The

Court pointed out at 326 U.S. 355 that the death of the husband transferred *his half* by operation of the Louisiana law either to his heirs or under his will; but it immediately spoke of the effect of such death on *the wife's half* in entirely different terms—not terms of transfer but words descriptive of the termination of the husband's control and the cessation of his powers to interfere with her "full and exclusive possession, control and enjoyment." And throughout the opinion the Court took great pains to justify the tax as an excise on something other than a transfer, something best described as an accession of possession and control. See especially 326 U.S. at 352, 353-4 (so construing the *Tyler* and *Jacobs* cases) and 356-7. In this last portion of the opinion the Court likened the principles sustaining the tax under the 1942 community property amendment of the federal estate tax law to those on which it had upheld an early California inheritance tax on the wife's half interest, saying (326 U.S. at 357):

"* * * But the levy upon the entire value of the community was sustained, not as a tax upon property or the transfer of it, but as a tax upon the 'vesting of the wife's right of possession and enjoyment arising upon the death of her husband,' which the Court deemed an appropriate subject of taxation, notwithstanding the contract, equal protection and due process clauses of the Constitution. * * *"

We submit that during the lifetime of both spouses, when the wife takes her previously vested half by court partition or other legal means or when the husband and wife voluntarily partition the property, there is just as clearly no "transfer" of *the wife's half* to her, but merely an "accession" to her of freedom from certain incidents. This accession includes, in the case of community property, freedom from the husband's sole control and sole possession and, in the case of joint tenancy property, freedom from the husband's possibility of survivorship and in some cases also freedom from his share in possession. This latter freedom, however, is only obtained where joint tenancy properties are divided in kind and the wife thus gets sole possession of her

separated half; but where the joint tenancy properties are partitioned into undivided interests held in tenancy in common—as was the situation with respect to most of the properties partitioned in this *Sullivan* case—no such freedom from the husband's share in possession is obtained by the wife because both husband and wife continue to share in possession as tenants in common just as they previously did as joint tenants.

If the accession of such incidents upon the husband's death is not a transfer by operation of law, as the Supreme Court says, how can the identical accession during the husband's lifetime be a transfer either by operation of law—in the case of a court partition—or by the acts of the parties—in other cases? The fundamental interest of the wife—her vested half interest which she acquired in this case when the property was first transferred into joint tenancy in 1922—has not been transferred by the partition; it has merely been freed of certain incidents of that type of property pertaining to the husband but not amounting to ownership.

This necessarily means that Section 811(c), which provides only for inclusion in the taxable estate of an interest in property as to which there has been a "transfer" simply cannot apply to such a partition, just as Section 810 which taxes a "transfer" at death cannot apply to the similar accession to the wife on the husband's death—Section 811(e)(1) being necessary to cover such accession. This, of course, does not mean that Congress could not tax the accession of incidents to the wife by reason of a partition undertaken in contemplation of death, if Congress chose to do so. We believe that such an extension of the present tax on transfers in contemplation of death to cover also a partition of the type involved in this case would be sustained as a constitutional excise tax for the same reasons that Section 811(e)(1) was sustained as an extension of the tax on transfers at death to cover accessions of incidents not amounting to transfers. But obviously an express statute would be necessary, just as Section 811(e)(1) was necessary to accomplish this result upon death.

It is therefore respectfully submitted that since the severance of the joint tenancy did not constitute a transfer by the decedent of the wife's one-half interest in the joint tenancy property, Section 811(c) does not apply so as to include in the decedent's gross estate the wife's interest in the property at the time of the partition.

IV. The Wife's Half of the Joint Tenancy Property Involved in Commuting the Property into Tenancies in Common or Partitioning It Between the Owners Is Not Includible in Decedent's Gross Estate Under Section 811(c), Because Section 811(c) Does Not Authorize the Inclusion in the Gross Estate of the Property Interest of Another Person in Property Transferred by the Decedent in Contemplation of Death.

It has just been argued, in the preceding section of this brief, that if the severance of the joint tenancy did not constitute a transfer by the decedent of his wife's interest in the joint tenancy property, there was no authority for including her property in the decedent's gross estate under Section 811(c) because that Section is only applicable to property *transferred* by the decedent. The Tax Court was probably aware of this because it did not say specifically in its opinion that the partition constituted a transfer by decedent to his wife of the wife's half interest. Instead of making any such statement, the Court simply proceeded on the assumption that the partition in some vague way, came under Section 811(c) and that therefore the Court could ignore the whole transaction and treat the property as still being held in joint tenancy at the decedent's death, thus including all of it in his taxable estate under Section 811(e)(1) (see 10 T.C. at 973, R. 112). In attempted support of this tax treatment of the transaction the Tax Court cites certain authorities* which use

**Igleheart v. Commissioner* (C.C.A. 5, 1935) 77 F.(2d) 704;
In re Kroger's Estate (C.C.A. 6, 1944) 145 F.(2d) 901;
Estate of Nathalie Koussevitsky (1945) 5 T.C. 650;
Estate of William Macpherson Hornor (1941) 44 B.T.A. 1136.

general language to the effect that the net result of including a transfer of property under Section 811(c) is to tax the property as though it had not been transferred at all but had been retained by the decedent until death. This is, in many cases, the practical result of applying Section 811(c)* and, where such is the result, there is perhaps no great objection to so expressing it, although obviously this is not what Section 811(c) actually provides, nor do any of the cases cited by the Tax Court say that it does. There is, however, great objection to taking such language out of its context and applying it to a case, such as we have here, where the result is very different from that prescribed by the statute. Section 811(c), when read with the introductory first paragraph of Section 811, provides that the value of the gross estate shall be determined by including the *value at death* of all property "to the extent of any interest therein of which the decedent has at any time made a transfer * * * in contemplation of * * * his death." The statute very specifically restricts the value of the property to be included to the interest which has been transferred. In other words, it is only the interest transferred in contemplation, as valued at death, that is includible.† In the *Sullivan* case the decedent at most only had a half interest in the joint tenancy property and, therefore, had he conveyed away his entire interest (which obviously he did not do), under Section 811(c) only his half would be includible. But the Tax

*This is usually the result in those cases where, except for the transfer in contemplation, the tax at death would apply to property then transferred from the decedent. But where, as in the case of joint tenancies, the tax on the wife's half is not based on a transfer from the decedent to her (see discussion and cases at pages 30-40, above), but is an excise based upon the enlargement of her rights in her own share of the property, the result of disregarding the transfer in contemplation and treating the joint tenancy as continuing until death is very different from the one prescribed by the statute.

†The Commissioner's own regulations in effect so provide. See Regulations 105, Section 81.15, reading as follows:

"If a portion only of the property was so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate."

Court, by misapplying the language of the cases which speak loosely of treating the transfer as not having been made, gets the erroneous result of including, not only the "interest therein of which the decedent has * * * made a transfer * * * in contemplation of * * * his death," but the whole property, including the wife's half, on the false assumption that the joint tenancy continued until death. Obviously there is no warrant for this in the statute nor may the Tax Court properly so legislate.

It is one thing to say that a person who transfers property in contemplation of death may be considered to be the owner of that property up to the date of his death, but it is quite another thing to say that when a joint tenancy is terminated, the same cotency relationship between the transferor and another person may be deemed to continue until the date of the transferor's death especially where the cotenant had the power and legal authority to change or terminate the relationship at any time. It seems obvious that Congress would not or could not tax the incidence of a relationship which might or might not have continued to date of death, on the assumption that it continued to death, when in fact it did not exist at date of death. In the case of *U. S. v. Jacobs*, supra, the Supreme Court in considering the question of the right of Congress to levy an estate tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a cotenant, pointed out:

"Until the death of her cotenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains."

The effect of the Tax Court's decision in the *Sullivan* case is that the wife's participation in the severance of the joint tenancy property is completely ignored, and the severance is given a construction which forecloses her from the exercise of the very right which the Supreme Court stated that she had and that she could use until the death of her cotenant to escape the inclusion of the entire joint tenancy property in the gross estate. By her participation in the severance the wife merely took steps

toward the further enjoyment of a property ownership which she already possessed, so it must be obvious that the Tax Court's conclusion that this property should be included in her co-tenant's gross estate results in the inclusion in the decedent's gross estate of the property of another person. It has been held by the United States Supreme Court in the case of *Lang v. Commissioner* (1938) 304 U.S. 264 that unless the Statute clearly and specifically permits it, it is improper to tax the property interest of another person as part of the gross estate of the decedent.

In that case the Supreme Court considered the question whether proceeds of insurance on the life of the decedent, who was a resident of the State of Washington at the time of his death, were includible in the gross estate of the decedent where the premiums on the insurance policy were paid by the decedent out of community funds. The statute (Section 302 of the Revenue Act of 1926) provided that property should be included in the gross estate, "(g) to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

After concluding that one-half of the community funds applied to the payment of the premiums was property of the wife, and that she became entitled to the proceeds of the policy in proportion to the amount so paid, the Court stated:

"In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation."

It would appear that even though the language of the statute, literally, was broad enough to cover all proceeds of insurance under policies taken out by the decedent on his life, the Court was of the opinion that only the decedent's property interest in

that insurance could be included in his gross estate, and that the general all-inclusive language of the Statute would not justify the taxation as part of the decedent's gross estate, of the property interest of another person in that insurance.

Just so in the case of a transfer of joint tenancy property by the joint tenants where one of the joint tenants is making the transfer in contemplation of death, it might well be concluded, on the analogy of the *Lang* case, that in the absence of a clear declaration it cannot be assumed that Congress intended that the property interest of another person in the joint tenancy property should be included in the gross estate of the decedent under the general language of Section 811(c) which provides for inclusion in the gross estate "to the extent of any interest * * * of which the decedent has at any time made a transfer * * * in contemplation of death * * *" In the *Sullivan* case the Tax Court included the property interest of the joint tenant, the wife, in the gross estate of the decedent, and it is respectfully urged that in the absence of any clear declaration in Section 811(c) that the property interest to be included in the gross estate, in the case of property transferred in contemplation of death, should include the property interest of another person in that property, the Tax Court erred in including in the decedent's gross estate the wife's interest in the property.

V. Section 811(c) Applies Only When an "Interest" in Property Is Transferred by the Decedent and No Such "Interest" Is Transferred When Joint Tenancy Properties Are Commuted into Tenancies in Common or Are Partitioned Between the Owners.

As we have demonstrated in parts I, II and III, above, after the severance of the joint tenancy decedent continued to own an undivided one-half interest in some of the property, and so did his wife. In four securities, the severance changed the former undivided one-half interest into a full ownership of a divided half. As demonstrated, the severance did not increase

the present rights of either party; it merely caused the relinquishment of an expectancy.

A. UNDER THE DECISIONS OF THE SUPREME COURT THE WORD "INTEREST," AS USED IN THE ESTATE TAX LAW, IS A WORD OF ART AND DOES NOT INCLUDE MERE EXPECTANCIES.

Section 811(c) applies only "To the extent of any *interest* * * * of which the decedent has at any time made a transfer * * * in contemplation of * * * death * * *." Thus the transfer of something not amounting to an "interest" does not bring Section 811(c) into application even if done in contemplation of death. Section 811(c) is not the only subdivision of Section 811 in which the word "interest" is used. Section 811(a), the basic subdivision, includes property in the gross estate "To the extent of the *interest* therein of the decedent at the time of his death." Since this quoted language and the previously quoted excerpt from Section 811(c) can both be traced back to the original estate tax statute enacted in 1916, the word "interest" undoubtedly has a corresponding meaning in each subdivision.

A power of appointment, even when coupled with an interest, is not an "interest" within Section 811(a). *United States v. Field* (1921) 255 U.S. 257, *Helvering v. Safe Deposit & Trust Co.* (1942) 316 U.S. 56. The *Field* case held that an exercised power of appointment coupled with what at common law is called an "interest," was not included in the taxable estate of the possessor of the power under the forerunner of Section 811(a). At that time this section contained three conditions to taxability: (1) the decedent must have an "interest" in the property; (2) the property must be subject to his debts; and (3) the property must be distributable as part of his estate. The Supreme Court held unanimously that though the second condition was satisfied, the first and third were not.

Helvering v. Safe Deposit & Trust Co., above, arose after the second and third requirements involved in the *Field* case had been repealed, so the power of appointment was taxable simply

if it was an "interest" of the decedent in property. The court, composed largely of its present members, reviewed the *Field* case and the history of the treatment of powers of appointment, and concluded that an unexercised power of appointment coupled with an interest was not an "interest" in property under Section 811(a) and accordingly was not included in the gross estate by virtue of that section.

It follows from these decisions that a power of appointment coupled with an interest is also not an "interest" within the meaning of that term in Section 811(c), as well as Section 811(a), so that a power of appointment coupled with an interest relinquished in contemplation of death would not be reached by Section 811(c). This has evidently been the Congressional understanding of Section 811(c), for when Congress subjected powers of appointment to the tax by adding a special subdivision, Section 811(f), it specifically wrote a contemplation of death clause into that section to bring into the estate powers of appointment relinquished in contemplation of death. See Section 811(f) (1).*

It is evident, then, that the word "interest" as used throughout Section 811 is a word of art, which does not include everything which conceivably might be characterized an interest at common law. This is not an unusual situation in the estate tax law. Cf. *United States v. Pelzer* (1941) 312 U.S. 399, relating to the term "future interests," and *Rogers' Estate v. Helvering* (1943) 320 U.S. 410, relating to the word "passing." Accordingly, in construing this word of art we start with the knowledge that it does not include one type of power in which the possessor has the right to income for life and the right to name the taker after his death, where these rights are not coupled with ownership in the ordinary sense. It should therefore not be surprising to find that it does not include a mere expectancy, in which none of these rights are present but are postponed to a contingency which may never happen.

*There is no like provision in Section 811(e), prescribing the tax consequences of owning property in joint tenancy at death.

B. - THE TRANSACTION IN THIS CASE MERELY TERMINATED THE RIGHT OF SURVIVORSHIP IN THE JOINT TENANCY PROPERTIES AND THIS RIGHT WAS, AT MOST, A MERE EXPECTANCY AND NOT AN "INTEREST" AND THEREFORE THE TRANSACTION IS NOT WITHIN THE PURVIEW OF SECTION 811(c).

The courts characterized the rights of a California wife in community property acquired before July 29, 1927 as an expectancy.

United States v. Robbins (1926), 269 U.S. 315;

Talcott v. United States (C.C.A. 9, 1928) 23 F.(2d) 897, cert. den. 277 U.S. 604;

Henshaw v. Commissioner (C.C.A. 9, 1929) 31 F.(2d) 946, cert. den. 280 U.S. 565.

In the two cases last cited this court held that with respect to such property the husband had the only taxable "interest" under Section 811(a), because, inferentially, the wife's expectancy did not amount to an "interest" on which she was taxable under Section 811(a). Argument is not necessary to demonstrate that the wife's expectancy in pre-1927 community conferred on her more present rights than, and as many future rights as, the joint tenant's expectancy gives him in the other tenant's half. Furthermore, we believe that it will not be questioned that if in contemplation of death a wife relinquished her expectancy in pre-1927 community property Section 811(c) would be without application, not only because she has not made a "transfer" (see part III, above), but also because what she has relinquished is not an "interest."

In common law states, a wife's dower rights constitute an expectancy during her husband's lifetime, although they have greater legal protection against unilateral termination by the other party than the joint tenant's expectancy in the other tenant's half enjoys. We have found no case in which the Bureau of Internal Revenue has sought to question the obvious fact that a wife's dower rights are not an "interest" under Section 811(a) and Section 811(c).

A contingent remainder which is terminated by death is fundamentally a particular type of expectancy, and it also is not an "interest" for purposes of Section 811(a) and Section 811(c). *Commissioner v. Rosser* (C.C.A. 3, 1933) 64 F.(2d) 631; *Hamlin v. United States* (1928) 66 Ct. Cls. 501, 7 AFTR 8916; to the same effect see *Kinney's Estate v. Commissioner* (C.C.A. 9, 1935) 80 F.(2d) 568.

The right of survivorship is the right to succeed to the other joint tenant's interest if one outlives him. So long as both are alive, this right is entirely contingent and is a mere expectancy. It may be terminated by the unilateral action of the other joint tenant, without the consent or even against the will of his fellow tenant. If the expectancy ripens, it will not confer rights of enjoyment greater in kind than dower rights to do in many states after the death of the husband, or than the wife's pre-1927 community rights will after the death of the husband, or than a remainder will when it has vested in fee. And a comparison of present rights will favor pre-1927 community and dower. Accordingly, we submit, the right of survivorship to the interest of the other joint tenant is a mere expectancy, not an "interest" under Section 811(a) or Section 811(c).

This conclusion is borne out by the very existence of Section 811(e), relating to joint tenancies and tenancies by the entirety. Why did Congress enact this provision if the right of survivorship was an "interest" under Section 811(a) and Section 811(c)? If it was such an "interest," all the property subject to a joint tenancy would be includible in the gross estate under Section 811(a) even if Section 811(e) were not in the statutes; half of it would be taxable because the decedent owned it and therefore had the typical "interest" in it, and the other half would be taxable because as to it he had a right of survivorship which existed until the moment of his death. We submit that this structure of the statute compels the conclusion that the right of

survivorship is not an "interest" within Section 811(a) and Section 811(c).*

For these reasons, we submit that the right of survivorship which decedent relinquished was not an "interest" within Section 811(c). This conclusion is not destructive of the Congressional purpose. The estate tax rule respecting joint tenancies and tenancies by the entirety is a harsh one, since it reaches property already owned by the survivor. We believe that for this reason Congress was not concerned with the tax avoidance possibilities of severances of these types of tenancies but was satisfied to reach only those that continued until death. Only this conclusion can explain the fact that Congress wrote a contemplation of death clause into other special rules as an integral part of them,[†] but wrote none into the joint tenancy provision, Section 811(e).

CONCLUSION

It is respectfully submitted that the Tax Court's decision that the wife's half of the joint tenancy properties is includible in the decedent's gross estate simply cannot stand. Even if it be assumed that the agreement of November 24, 1943 was made by the decedent in contemplation of death, it is yet plain that, as to the property that had previously been joint tenancy property, his wife's half cannot be included in the gross estate under Section 811(c) because

*The presence of Section 811(e) cannot be explained on the ground that it was necessary to give a home to the proviso in it under which joint tenancy property is not taxed in the estate of one who provided none of the consideration for its purchase. Had Section 811(a) been thought sufficient to tax the entire joint tenancy property, the proviso would have been added to it instead of writing a redundant subdivision. Moreover, a reading of Section 811(e) cannot leave doubt that Congress thought its general rule was an addition of substance to the statute. This section specifically refers to the "interest" of "decedent *and any other person*," plainly showing that to reach the "interest" of decedent alone was not enough.

†Revocable transfers, Section 811(d)(1), (2) and (4); powers of appointment, Section 811(f)(1); special rule relating to community property in effect between 1942 and 1948, Section 811(d)(5) and Section 811(e)(2).

(1) as to that half the decedent has no "interest"—at most he had a mere expectancy, should he survive his wife;

(2) the agreement did not result in any "transfer" by the decedent of an interest in his wife's half of the property, but merely terminated the right of survivorship and left the property vested in her as before; and

(3) even had there been a "transfer" of an "interest" by the decedent in his wife's half of the property, the decedent received in return a consideration that was identical with whatever he transferred and therefore the transaction was a bona fide sale for an adequate and full consideration on both sides within the meaning of Section 811(c) and therefore is not taxable.

The decision of the Tax Court should be reversed.

Respectfully submitted,

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APPENDIX

The following are applicable provisions of the Internal Revenue Code as in effect during the period from November 1943 to January 1944, both inclusive:

"SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. * * *

[Table of rate brackets omitted.]

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,* except real property situated outside of the United States—

(a) DECEDENT'S INTEREST.—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) REVOCABLE TRANSFERS.—

* * * * *

(5) TRANSFERS OF COMMUNITY PROPERTY IN CONTEMPLATION OF DEATH, ETC.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

(e) JOINT AND COMMUNITY INTERESTS.—

(1) JOINT INTERESTS.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person:

Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) COMMUNITY INTERESTS.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

(f) POWERS OF APPOINTMENT.—

(1) IN GENERAL.—To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, or (B) with respect to which he has at any time exercised or released a power of appointment in contemplation of death, or (C) with respect to which he has at any time exercised or released a power of appointment by a disposition intended to take effect in possession or enjoyment at or after his death, or by a disposition under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall

possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * *

(i) TRANSFERS FOR INSUFFICIENT CONSIDERATION.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

No. 12027

In the United States Court of Appeals
for the Ninth Circuit

ESTATE OF FRANK K. SULLIVAN, DECEASED, BY FLOYD
K. SULLIVAN, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,

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FILED

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PAUL W. OGDEN,



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12027

ESTATE OF FRANK K. SULLIVAN, DECEASED, BY FLOYD
K. SULLIVAN, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion is that of the Tax Court promulgated May 27, 1948 (R. 90-114), which is reported in 10 T. C. 961.

JURISDICTION

The petition for review (R. 116-121) involves a deficiency in federal estate taxes determined by the Commissioner of Internal Revenue against the estate of the decedent, Frank K. Sullivan, who died January 9, 1944. On August 15, 1946, the Commissioner mailed to the decedent's estate and to Floyd K. Sullivan, the executor of the decedent's will, a notice of deficiency in estate taxes in the amount of \$18,963.17. (R. 15-18.)

Within ninety days thereafter and on November 12, 1946 (R. 24), the taxpayer filed a petition with the Tax Court of the United States for a redetermination of such deficiency under the provisions of Section 871(a) of the Internal Revenue Code (R. 3-24). The decision of the Tax Court affirming the Commissioner's deficiency determination was entered May 27, 1948. (R. 115.) The proceeding is brought to this Court by the petition for review, which was filed August 2, 1948 (R. 121), under the provisions of Section 1141(a) of the Internal Revenue Code as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether the bundle of rights possessed by the decedent in the property held by him and his wife in joint tenancy is an "interest" in the property, within the meaning of Section 811(c) of the Internal Revenue Code; and, if so, whether a gift made by the decedent and his wife to their son of a portion of the property and an agreement entered into between the decedent and his wife to convert the balance into common property are "transfers" made by the decedent of such interest within the meaning of the section.

2. If the agreement involves a transfer by the decedent of his interest therein within the meaning of Section 811(c), then whether such transfer is not a sale for an adequate and full consideration in money or money's worth within the meaning of the section.

3. If both the gift and agreement meet the requirement of Section 811(c) that they be transfers by the decedent of an interest which he had in the property, as well as the requirement that the contract be not a sale for an adequate and full consideration in money or money's worth, then whether only one-half of the value of the property subject to each of such transfers and

not its entire value at the decedent's death is to be included in his gross estate under the section, provided that such transfers were made by the decedent in contemplation of his death within the meaning of the section.

4. If the gift and the agreement otherwise meet the requirements of Section 811(c), then whether there is substantial evidence to sustain the Tax Court's findings that they were made by the decedent in contemplation of his death within the meaning of the section.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set out in the Appendix, *infra*.

STATEMENT

Most of the essential facts were stipulated (R. 27-90), and the Tax Court adopted the stipulation in its entirety, as an integral part of its findings (R. 91). The stipulated facts, as well as those specifically found by the Tax Court (R. 91-101), may be summarized as follows:

In 1918, the decedent sold his coal business in Minnesota for \$100,000 and moved with his wife and minor son to Los Angeles, California, where he invested the proceeds in income producing property.¹ (R. 92.)

¹ In this connection the record discloses that the decedent had other property and funds when he arrived in California. The witness, Clyde C. Triplett, a lawyer whom the decedent and his wife consulted about the disposition of their property shortly before his death, testified that the decedent had told him he was worth more when he came to California than he was at that time (R. 94, 177), and the Tax Court took note of this in its findings of fact (R. 93-94). Moreover, the decedent's son, Floyd K. Sullivan, who was the executor of the decedent's will, testified that at the time of his death, the decedent and his wife were worth between \$150,000 and \$175,000. (R. 162.) The record does not, however, disclose the exact worth of the decedent and his wife at the time they came to California; and, though, as indicated, the record discloses that they must have

With respect to the tenure of his property, it was stipulated (par. 14, R. 35) and specifically found by the Tax Court (R. 99) that, prior to November 24, 1943, when the decedent and his wife confirmed a previous gift of property of the value of \$33,526.54 to their son and made an agreement converting the balance of their property from joint into common property, all of the property held by either or both was held by them in joint tenancy, except a single item of real estate, namely, lot 31, Nadeau Villa Tr. Bell, of a value of \$750, which was held by the decedent alone (Stip. par. 4(b), Item 3, R. 29). And, in this connection the Tax Court further found that the decedent and his wife had so informed an attorney, Clyde C. Triplett, whom they had consulted at the suggestion of their son, at their first conference with Triplett held on September 27, 1943. (R. 93-94.) And, finally, in this connection, it was stipulated (par. 6, R. 32-33), and particularly taken note of by the Tax Court in its opinion (R. 113-114), that, if the decedent had died immediately prior to the execution of the agreement of November 24, 1943, after the making of the gift to the son in accordance with a letter dated November 19, 1943, all of the property of the decedent and his wife, excepting only that standing in the name of the decedent alone (namely, the single lot aforesaid), would have been includible in the decedent's gross estate under Section 811(e)(1) of the Internal Revenue Code, and that the property standing in the name of the decedent alone would have been includible therein either under Section 811(e)(1) or 811(a).

The decedent resided with his wife and their son in California until his death, which occurred on January 9, 1944, at the age of seventy-seven. After the sale of

sustained some losses after they came to California, it does not disclose what these were or to what extent or how they recouped them.

his coal business and until his death, the decedent was not employed and did not engage in any business other than to look after his interests. (R. 91-92.)

In 1930 he gave his son and the latter's wife a house and a lot in Beverly Hills. (R. 92.)

In 1931, the son became a member of a partnership engaged in the general brokerage business, and the decedent then deposited \$25,000 in securities with a bank for use by the partnership as collateral in connection with sales and purchases. The partners sustained losses in this venture. The decedent's loss therein was about \$12,000. In settlement of such loss, the son and his wife conveyed to the decedent a duplex apartment, of a value of about \$7,500, which had been inherited by the decedent's son's wife. The partnership was dissolved in August, 1934. (R. 92-93.)

In 1943, the son was forty-four years of age and had a daughter thirteen years old. His earnings in 1940, 1941, 1942 and 1943 were \$3,425, \$2,768, \$4,481 and \$5,221, respectively. (R. 93.)

In 1943,² the decedent and his wife informed their son of their desire to make a gift to him in order, as they then told him, to enable him to make payments on the mortgage on his house and to make it easier for him to meet his obligations,³ whereas shortly thereafter on

² The son testified that this was in the middle of September, 1943. (R. 127.)

³ In this connection, the Tax Court had already found that in 1933, in order to pay the household expenses and other deficits incurred in the brokerage business, the son had borrowed \$7,500 on the house his father had given him (R. 92-93), and further, that the son had been making payments for ten years on the mortgage (R. 93). But the record does not disclose how much the son had paid on the loan during the time or what the balance of it was in 1943; nor does it disclose the precise amount of the gift which the decedent and his wife intended at first to make to their son. However, the lawyer Triplett testified that when he told the decedent and his wife at their first conference, held on September 27, 1943, that they could make a gift of \$33,000 which would be free from

September 27, 1943, they informed Triplett that the gift was intended "to augment their son's income." (R. 93.) The precise testimony of the son with regard to the reasons his parents gave him for making the gift to him was that he had quite a lot of obligations and bills and a rather sizeable mortgage on a home at the time; that his father and mother had said they would like "to repay the cost in order to make it a little easier for me and they wanted to make a gift." (R. 126.) On the other hand, Triplett testified that Mrs. Sullivan had said to him: "What we wanted to give him, what we want to give him is something that will give him some additional income." (R. 174.) The gift was, however, not made until November 19, 1943, when it was evidenced by a letter of instructions to the brokers who held the stock, signed by the decedent and his wife. (Stip. par. 5(d), R. 32.) This letter is attached to the stipulation as Exhibit 1(A). (R. 38-39.) But the amount of the gift thus made was \$33,526.54.⁴ (Stip. par. 4(d), R. 29-30.)

In the meantime, another meeting between the decedent, his wife, and Triplett was held in the latter's office on November 9, 1943. At this time, Triplett informed the decedent that it was not a good idea to hold his property as a joint tenant since upon the death of a joint tenant it passed to the survivor and was includible in the gross estate of the decedent. Triplett

the federal gift tax if they had made no prior gifts, the decedent's wife said that they, referring to herself and the decedent, did not have in mind giving him that much; what they wanted to give him was "something that would give him some additional income." (R. 175.) However, she later stated to Triplett that they had in mind giving their son "about half of what I suggested they could give him." (R. 175.)

⁴ We think it is obvious the decedent and his wife increased the amount of the gift which they had originally intended to make to the son, as testified to by the witness Triplett, to the amount stated because of his advice that a tax free gift in the amount of \$33,000 could be made by them. (R. 174.)

further said it was advisable to terminate the joint tenancy and to divide the property between them as tenants in common, or to divide it in kind, such as could be so divided. Triplett expressed the opinion that the transaction would be a non-taxable exchange and that thereafter one-half of the property would be in the wife's estate, so that the ultimate tax savings would not be very much, and that such transfer would involve additional probate expenses. Thereafter the decedent informed Triplett that he and his wife thought Triplett's advise was sound and requested him to draw the necessary legal documents to convert the title to the property into tenancies in common. (R. 94-95.)

On November 7, 1943, that is, two days before the last mentioned conference between the decedent and his wife and Triplett, the decedent consulted a doctor. The doctor's report of the consultation shows that the decedent's appearance at that time was "deep amber." (R. 47.)

On November 18, 1943, the decedent was admitted to the Cedars of Lebanon Hospital for treatment. (R. 34.) The doctor's record of that date shows that the decedent had felt quite well up to about three weeks before that time (that is up to about October 27, 1943), and that since then there were no definite complaints except jaundice—yellow skin—noted in the last three days; loss of weight, fifteen pounds in the past year and eight pounds in the past two months, no great loss having occurred before, but that the decedent had not eaten less to account for that, lack of appetite being noted only in the last week and that the decedent had previously eaten everything with zest, though less the last few days; weakness had been present only in the last few days, but was not marked; drowsiness had also been present in the last few days; abdominal pain began four or five days before as a tenderness beneath the right

costal margin, but left after a few days and was never sharply defined. (R. 48.)

The records of the hospital as of date November 21, 1943, disclosed the diagnosis of the decedent's ailment to have been "obstructive jaundice, cause not determined." (R. 43.) The decedent remained in the hospital until November 24, 1943, when he was discharged, with the following notation on the hospital records of that date signed by the doctor: "IMPRESSION: Obstructive Jaundice Probable Ca of Pancreas." (R. 46.) The Tax Court found the facts with regard to the decedent's illness, etc., to be in substance as above stated and in addition that the doctor had discharged the decedent as a surgical case. (R. 96-97.)

On November 24, 1943, a short time before the decedent left the hospital, his son arranged with Triplett for a meeting of the latter and the decedent and his wife in one of the apartment houses owned by the decedent for the purpose of executing the contract changing the tenancy of their jointly held property to common property. Such meeting was thereafter held on that day and the contract then executed, as well as certain deeds and assignments carrying the agreement into effect. (R. 97-98.) In this connection, the Tax Court found that the division of the property on November 24, 1943, was the result of suggestions made by Triplett. (R. 99.) On November 26, 1943 a letter was written by the First California Company to one Philip C. Jones, confirming the record ownership of the securities which were the subject of the gift referred to in the letter of November 19, 1943, above mentioned. (Ex. 2-B, R. 40-41.)

After the various documents were executed, Triplett, at the same conference suggested that the decedent and his wife permit him to examine their wills under which each had left his or her property to the other. He expressed to them the opinion that their wills should each

leave a life estate in the property to the survivor with the remainder over to the son, as such a plan might avoid a subsequent probate proceeding and tax expense. The decedent did not, however, like the idea, stating that if his wife predeceased him, he could look after his own affairs. At the time, the decedent informed Triplett that the doctors thought he had something wrong with his gall-bladder but he thought they did not know what they were talking about. (R. 99-100.)

New wills were drafted by Triplett for the decedent and his wife and were thereafter executed on November 30, 1943. The will of the decedent left all of his property to his wife for life with the remainder interest to his son. In the event his wife predeceased him, all of his property was to go to his son. Provision was also made for the disposition of the property in the event both his wife and son predeceased him. The will of the decedent's wife did not contain a provision to give him a life interest in her property. (R. 100.)

From the foregoing facts the Tax Court made its ultimate finding that the transfers made on November 19, 1943, and November 24, 1943, were made in contemplation of death and that the latter was not a bona fide sale for an adequate and full consideration in money or money's worth. (R. 101.)

The case was reviewed by the entire Tax Court and its decision for the Commissioner entered without dissent. (R. 114.)

SUMMARY OF ARGUMENT

Preliminary

The Tax Court included the value of the property here in question in the decedent's gross estate under Section 811(c) of the Internal Revenue Code on the basis of its finding that the decedent had made the transfers of his interest therein in contemplation of his death

within the meaning of that section. It did not include it under Section 811(e) as jointly held property, as the taxpayer (as well as the friends of the Court) contends.

The importance of the local law regarding jointly held property lies only in the fact that such tenancy by husband and wife is permissible under the California law, and in the further fact that, in California as elsewhere generally, the primary incident of jointly held property is the right of survivorship. Local law is also important here in its specification of the manner in which such tenancy may be dissolved.

Beyond that, however, the federal law controls in regard to the four questions presented, namely (1) whether the bundle of rights which the decedent had in the property is an interest therein and whether the dispositions he made thereof by gift and contract were transfers within the meaning of Section 811(c); (2) if the contract was such a transfer, then whether it was not a sale for an adequate and full consideration in money or money's worth within the meaning of the section; (3) whether, if the gift and contract otherwise meet the requirements of Section 811(c), the value of the entire property, or of only a portion thereof, is includible in the decedent's gross estate, and (4) whether the transfers were made by the decedent in contemplation of his death.

An *amicus* brief concerns itself only with the first three questions, conceding the fourth, in effect.

I

The bundle of rights which the decedent had in the property which he jointly owned with his wife is an interest therein within the meaning of Section 811(c). The decedent did not merely have an undivided half interest therein; his interest extended to the whole. The

right of survivorship is only one of the incidents of joint tenancy and is itself an interest in the property so held. Moreover, by the gift and contract, the decedent made transfers of such interest, i.e., of his entire bundle of rights in the property, including his right of survivorship. And so far as concerns the contract, he did not merely relinquish that right. By the gift the decedent transferred to his son all of his interest in the property, including the right of survivorship. It is immaterial that, as a result of the gift, the right of survivorship disappeared.

The contention that the right of survivorship is not an interest in the property within the meaning of Section 811(a) because not includible therein under that section, and that it is, therefore, not an interest therein within the meaning of Section 811(c), is without merit. It is not includible under Section 811(a) because it ceases at the decedent's death, not because it is not an interest.

Nor is the right of survivorship substantially similar to a general power of appointment, which is likewise not includible under Section 811(a). Unlike the right of survivorship, such power is not an interest in the property within the meaning of Section 811(a), but only a right exercisable in respect thereof.

The right of dower (or courtesy) also presents no analogy. While such right is regarded as an interest in property, it is not the right of dower (or courtesy) of the *decedent* in his property which is includible in his gross estate, but the right which the *survivor* has therein in virtue of his (or her) relationship to the decedent. It is obviously for this reason that such right is not includible under Section 811(a).

But, as stated, we are not dealing here alone with the relinquishment of the right of survivorship. We are dealing with dispositions by the decedent of his interest

in jointly held property, and such dispositions are "transfers" within the meaning of Section 811(c).

The word "transfer" as used in that section has been given an ever wider connotation by both the Congress and the courts. The cases cited by the friends of the Court involving a renunciation of a testamentary gift and the relinquishments of a general power of appointment are not apposite here.

II

The contract was not a sale for an adequate and full consideration in money or money's worth within the meaning of Section 811(c). Each joint tenant could have dissolved the tenancy by unilateral action, even without the knowledge or consent of the other, and each could have relinquished his interest therein to the other, without consideration. Moreover, the contract was merely a family arrangement of the type which does not import a consideration for federal tax purposes. Finally, the two Third Circuit cases cited by the friends of the Court have, as they themselves say, been legislatively overruled. The result of such reversal, as pointed out by the Supreme Court, is that a release of dower cannot be regarded as being made for an adequate and full consideration in money or money's worth within the meaning of the section.

III

The value of the whole of the jointly held property is includible in the decedent's gross estate if the transfers made by the decedent of his interest therein were made in contemplation of his death. It is necessary so to construe the statute in order to implement its purpose to prevent the evasion of the estate tax by the making of substitutes for testamentary dispositions. Such construction, moreover, does no violence either to the joint

tenancy concept, or to the Section 811(c) concept, of the interest which the decedent had therein. For such interest extended to the whole, each tenant being regarded as the owner of the whole. Section 811(c), as well as other federal statutes, has been broadly construed by the courts in other respects in order that their purpose be not defeated. There is no reason why Section 811(c) should not be accorded a similarly broad construction here. There is no merit to the contention that the word "interest" as used in Section 811(c) should be construed the same as it is when used in Section 811(a). Congress has frequently used words with different connotations even in the same statute, and it has obviously done so here.

IV

The transfers were made by the decedent in contemplation of his death within the meaning of Section 811(c). The gift, the contract and the will constituted steps in an integrated transaction designed to effect a final disposition of all of the decedent's worldly possessions. That being so, such disposition, and each component part thereof was obviously made by him in contemplation of his death. Moreover, the decedent made the transfer in contemplation of his death in the basic sense of anticipating the possibility of dying in the more or less immediate future. Such final disposition of the property was conceived and carried out by him during his last illness, and the contract, as an integral part of such disposition, was made in order to evade the federal estate tax. No dominant life motive for the transfers is apparent. Moreover, the possible co-existence of a life motive therefor, or for any part thereof, is immaterial because of the fact that the decedent's dominant purpose therefor appears to have been to make a disposition of the property in view of

his death and in order, in part at least, to evade the federal estate tax.

ARGUMENT

The Tax Court's Findings and the Basis of its Decision

The taxpayer's argumentative statement of facts (Br. 6-16), as well as its presentation to the Court of sixteen questions (Br. 17-21) and thirty-six assignments of error and specifications of the insufficiency of the evidence to sustain the findings (Br. 22-27), is obviously the result of its misconception of the Tax Court's findings and the basis of its decision in two important respects.

The first of these (Br. 47, 50) is the taxpayer's conclusion that the Tax Court failed to find and to assume as a basis of its decision that all of the property involved in the gift, made by the decedent and his wife to their son, was their joint property, regardless of how it was actually held. From this premise, the taxpayer argues that the Tax Court erroneously held the decedent to have been the sole owner thereof and that it thus, in effect, found the gift to have been made by the decedent alone, with the result that, instead of including only the value of one-half (the decedent's half) of the property in his gross estate, it included the value of his wife's half as well in disregard of her rights in the property under local law.

But there is no justification for saying that the Tax Court made no finding with regard to the character of the property, or that it failed to find that it was jointly held. As disclosed in our statement of facts, the Tax Court adopted the stipulated facts (R. 91), among which was the fact that the tenure of all of the property subject to the gift was at the date thereof held by the decedent and his wife in joint tenancy. (Stip. par. 14, R. 35.)

Moreover, in this connection, it was also stipulated (Stip. par. 6, R. 32-33)—and it is so stated in our statement of facts—that the property would but for the gift have been includible in the decedent's gross estate as jointly held property under Section 811(e)(1) of the Internal Revenue Code (Appendix, *infra*). And it is here particularly to be noted that the Tax Court adverted to this in its opinion. (R. 113-114.)

The taxpayer's second misconception of the Tax Court's findings and the basis of its decision relates to what the taxpayer obviously regards as an alternate, but actually inconsistent basis for the Tax Court's inclusion in the decedent's gross estate of the entire value of the property which became the subject of the gift to their son, as well as the sole basis for the Tax Court's inclusion therein of the entire value of that which became the subject of the agreement between the decedent and his wife to convert the balance of their property into common property.

The taxpayer's contention here is epitomized in the following statement found in Point II of its brief (pp. 41-54), which embodies its contention with regard to the includibility in the decedent's gross estate of the value of the property given by the decedent and his wife to their son. This is to the effect (Br. 49) that, while the Tax Court confirmed the Commissioner's determination that such property was includible in the decedent's gross estate under Section 811(c) (Appendix, *infra*) as a transfer made in contemplation of death, it in fact imposed the tax not under that section but under Section 811(e), which requires the inclusion in the decedent's gross estate of property held jointly at the date of his death. A similar epitomy of the taxpayer's contention will be found in Point III of its brief (pp. 55-73), embodying its contention that the balance of the property which became the subject of the

agreement was not includible in the decedent's gross estate (Br. 56). While, as stated, this view of the Tax Court's findings and decision forms an alternate basis for the taxpayer's contention that the value of the property subject to the gift is not includible in the decedent's gross estate, and the primary basis for its contention that the value of the property subject to the agreement is not includible therein, such view is more elaborately stated and developed in the taxpayer's third point relating to the agreement than in its second point relating to the gift.⁵

The taxpayer's contention in this regard is, however, without basis in point of fact. To the contrary, the express finding of the Tax Court is that both the gift and agreement were made in contemplation of the decedent's death and, in this connection, that the agreement was not a *bona fide* sale for adequate and full consideration in money or money's worth. (R. 101.) Obviously, that finding is one which is solely designed to bring both the gift and the contract within the contemplation of death provisions of Section 811(c). By contrast, there is no finding either circumstantial or otherwise which would justify the inclusion of the value of the property in the decedent's gross estate under Section 811(e)(1), so that on its face the taxpayer's contention does violence to the Tax Court's findings and its decision which is based thereon.

Moreover, a perusal of the Tax Court's opinion (R. 102-114) discloses that it is entirely devoted to a discussion of the various contentions of the parties for and against the inclusion in the decedent's gross estate of the property subject to the gift and contract, on the

⁵ An *amicus* brief filed by some ten San Francisco lawyers and their law firms, at pp. 30 and 40 thereof cavalierly supports this view, by assuming, without any discussion however, that this is the basis for the Tax Court's inclusion in the decedent's gross estate of the value of the property which became the subject of the contract.

ground that both constituted transfers in contemplation of his death of an interest which the decedent had therein, within the meaning of Section 811(c), and if the contract was to be regarded as such as to whether or not it was a *bona fide* sale for an adequate and full consideration in money or money's worth within the meaning thereof.

To be sure, the Tax Court discussed Section 811(e) (1), but only to show that, but for the transfers, all of the property subject thereto would have been includible in the decedent's gross estate thereunder, because it would then have remained joint property at the decedent's death. But the only point which the Tax Court sought in that connection to make is that Section 811(c) in effect treats the interest of the decedent in property which is the subject of an *inter vivos* transfer in contemplation of death, but which would otherwise have been includible in the decedent's gross estate at his death under one of the other subdivisions of the section involving the inclusion in the gross estate of such an interest, as though the decedent had retained such interest at death so that it would be includible in his gross estate under such other subsection. In support, the Tax Court cited a number of decisions, primarily that of the Fifth Circuit in *Igleheart v. Commissioner*, 77 F. 2d 704, quoting the following language therefrom (p. 711):

For the purposes of the tax, property transferred by the decedent in contemplation of death is in the same category as it would have been if the transfer had not been made and the transferred property had continued to be owned by the decedent up to the time of his death.

The Tax Court, however, also cited as being to the same effect the decision of the Sixth Circuit in the case of *In re Kroger's Estate*, 145 F. 2d 901, certiorari denied,

324 U.S. 866, as well as its own decisions in *Estate of Hornor v. Commissioner*, 44 B.T.A. 1136, and *Estate of Koussevitsky v. Commissioner*, 5 T. C. 650.

A word should be said with regard to the taxpayer's contention that the state law is controlling here. Of course it is, but only to the extent that it determines the character of the interest which each joint tenant has in joint property, including the extent of the power he has over its disposition. But the incidents of joint tenancy are no different in California from what they are elsewhere, and these are well understood.

Thus, the importance of the California law of the tenure of property by husband and wife, so far as concerns the federal estate tax, is twofold. It lies first in the fact that California recognizes the tenure of property by husband and wife in joint tenancy and that it is separate and distinct from community property on the one hand and from common property on the other; and, secondly, in the fact that each tenant may dispose of his interest therein, as well as in the manner in which he may do so. But the fact that the three tenancies above mentioned may have common incidents and that a conversion of any one of them into another results in a retention of such incidents is of no importance. What is important is the fact that there are incidents in each which differentiates it from the others. Thus, the important incidents of jointly held property which distinguish it from both community and common property are, first, the right of survivorship to the whole, and secondly the fact that, as a result, the disposition by one of the joint tenants of any part of it by will is ineffective unless he survives the other. Jointly held property is also distinguishable from community property, though not from common, in that a joint tenant may alone dissolve the tenancy and may do so even without the knowledge or consent of his co-

tenant. Indeed, these are the three incidents of jointly held property which are of primary importance here. The others are only of secondary importance in that they complete the bundle of rights each tenant has in the property. These are (1) that each tenant is during the continuance of the tenancy entitled to the possession and enjoyment of the whole thereof, in which respect it is different from both community and common property, though ~~from~~^{for} wholly different reasons; (2) that the income from jointly held income bearing property belongs one-half to each tenant, which, however, is common to all three tenancies, with certain possible qualifications as regards community property which are not material here; (3) that only one-half of jointly held property may be taken for the debt of a co-tenant, similarly as in the case of common property, but unlike in the case of community property, with possible qualifications not material here.

To sum up: The importance of the local law of property lies only in the fact that it is determinative of the right, title and interest of its owners therein, both before and after its disposition, including the time and manner in which such right, title and interest may be disposed of. But whether the incidents of ownership, or the time and manner of their disposition, brings such disposition within the federal taxing statute is solely one of federal law. *Burnet v. Harmel*, 287 U.S. 103, 110; *Palmer v. Bender*, 287 U.S. 551, 555; *Lyeth v. Hoey*, 305 U.S. 188; *United States v. Pelzer*, 312 U.S. 399, 402, 403; *Helvering v. Stuart*, 317 U.S. 154, 161; *Estate of Rogers v. Commissioner*, 320 U.S. 410, 414; *Estate of Putnam v. Commissioner*, 324 U.S. 393, 395-396.

Thus, the four questions here presented are to be determined by the federal and not the state law, for each of them involves the evaluation of concepts of

federal law and, as is made clear by the authorities above cited, their meaning should be uniform because the federal revenue act is applicable throughout the nation. These questions are: (1) whether the bundle of rights which the decedent possessed in the property under state law is an "interest" therein and whether the dispositions he made thereof by way of gift and contract were transfers thereof, within the meaning of Section 811(c) of the Internal Revenue Code; (2) whether, assuming that the agreement involved a transfer of the decedent's interest in the property, it was not a sale for an adequate and full consideration in money or money's worth, within the meaning of the section; (3) whether, if the gift and agreement otherwise meet the foregoing requirements of the section, only one-half of the value of the property subject to each of such transfers, and not its entire value at the decedent's death, is includible in his gross estate, provided that such transfers were made by the decedent in contemplation of his death within the meaning of the section; and, finally (4) whether the transfers of such interest were made by him in contemplation of his death within the meaning of the section.

An *amicus* brief⁶ in support of the taxpayer's first three contentions was filed by a number of San Francisco lawyers and law firms because these three questions allegedly are of great general importance. But these friends of the Court professedly represent no clients directly interested in the questions presented in this case, but only taxpayers generally who may be similarly situated and among whom some of their present and future clients may appear. They assert that they do not discuss the fourth question because, in their view, it lacks like importance. And, yet, that question is, in our view, the all important one in this

⁶ Already referred to in fn. 5, *supra*.

case and is, besides, so closely and directly related to the others as not to be separable therefrom in any discussion of the problems presented in this case. The result is that the *amicus* brief is inconclusive. It is, besides, predicated solely on the existence of alleged quirks in both the state and federal law, which the friends of the Court seek to import into the latter and thereby to defeat the well understood dominant purpose of Congress to reach substitutes for testamentary dispositions in order to prevent the evasion of the estate tax, such as those here in question obviously are. *United States v. Wells*, 283 U.S. 102, 117; *Nichols v. Coolidge*, 274 U.S. 531, 542; *Milliken v. United States*, 283 U.S. 15, 20; also *Heiner v. Donnan*, 285 U.S. 312, 323. In any event, the fact that they do not attempt to support the taxpayer's contention that the gift and contract were not made by the decedent in contemplation of his death is adequately to be explained only on the ground that they regard such contention as insupportable.

It is submitted that the tenuous construction of the federal statute for which both the taxpayer and the friends of the Court contend in order to defeat its purpose does violence to what we regard as its plain, obvious and rational meaning, which, as the Supreme Court said in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, adopting the language of the Eighth Circuit in that case—

is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

We turn to the separate consideration of the merits of each of the questions presented.

I

The bundle of rights possessed by the Decedent in the jointly held property is an "interest" of which the Decedent made a "transfer" within the meaning of Section 811(c) of the Internal Revenue Code

We think it goes almost without saying that the bundle of rights which the decedent had in the joint property at the time the gift and the contract here in question were made represents an interest of the decedent therein not only under Section 811(c) of the Internal Revenue Code, but under California law, as well. It will not be necessary to recount these rights. Suffice it to say that the right of survivorship is one of incidents of that interest. Moreover, such right might at any moment, so long as the tenancy existed, ripen into a complete ownership of the property in the decedent by the death during his lifetime of his cotenant. But such interest is not merely an interest in one-half of the property. It extends to and affects the whole of it, so that any disposition by a joint tenant of his interest in jointly held property extends to and affects the whole in a tax sense, though it does not, of course, comprise the whole.⁷

⁷ The contention of the friends of the Court (Br. 45-46) that the word "interest" as used in Section 811(a) (Appendix, *infra*) is a word of art is not worthy of extended answer. No court has ever so held, or, as we believe, is likely to do so. The contrary is true. Certainly, the friends of the Court do not pretend to give any artful definition of the word as used in the statute, and they cite no authority or reason for limiting its application even to conventional interests in property. The fact that the word "interest" as used in the section does not comprise all rights in property is of no moment; for it does not comprise them even in its ordinary connotation. Moreover, as we shall presently show, the word "transfer" as used in Section 811 in connection with the word "interest" is not only not a word of art, but is not even used therein in its ordinary sense, for it has from time to time been accorded an even broader connotation by both Congress and the courts in the death tax statute, in order to encompass transactions which do not involve a transfer of property, or of an interest therein, in the ordinary sense. See

As regards the gift to the son, with which the friends of the Court do not however deal but only the taxpayer, the latter contends (Br. 45) that the decedent and his wife each made a gift of an *undivided* one-half interest in the property which the taxpayer says each owned therein. In other words, the taxpayer treats the gift by each tenant of jointly owned property as though it were a gift by each of a half interest therein held by them in common. Thus, the taxpayer's contention that each made a gift of a half interest in the property does not take into account the fact that the decedent had a right of survivorship in the property and, as a result, an interest in the whole, and that the gift of his interest was a gift of an interest in the whole, which included the right of survivorship. In this connection, the friends of the Court, though not the taxpayer—at least not explicitly—seek to buttress this contention by asserting (Br. 47-49) that such right of survivorship is itself not an interest in property at all within the meaning of Section 811(c).

But, as already indicated, it is not true to say that the gift constitutes only a transfer by the decedent of an

e.g., *Burnet v. Guggenheim*, 288 U. S. 280, 286-287, which with many other authorities along the same line, is hereinafter more particularly referred to. Thus, speaking of the power of Congress to impose death taxes, the Supreme Court said in *Fernandez v. Wiener*, 326 U. S. 340, 352:

It is true that the estate tax as originally devised and constitutionally supported was a tax upon transfers. *Knowlton v. Moore*, 178 U. S. 41; *Y.M.C.A. v. Davis*, 264 U. S. 47, 50. But the power of Congress to impose death taxes is not limited to the taxation of transfers at death. It extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death. See *Bromley v. McCaughn*, 280 U. S. 124, 135, *et seq.*

As hereinafter more fully shown, the exercise by Congress of such power has actually extended to every incident of the ownership of property mentioned by the Court.

undivided half interest therein. To the contrary, the gift represents a transfer by the decedent of his undivided interest in the whole of the property, including the right of survivorship. To be sure, such right was not transferred in the sense that it was conferred as such upon the donee. However, in virtue of the gift, the donee acquired all of the incidents of the decedent's ownership in the property, in which the right of survivorship became merged and disappeared. But the fact that it did so is of no moment here. Obviously, the decedent's gift involved something more than a gift of a half interest in the property. It follows that the taxpayer leaves completely unanswered the question whether Congress intended by Section 811(c) to encompass a transfer by way of gift of a joint interest in property, if made in contemplation of death. Of course, that question cannot properly be answered without taking the right of survivorship into consideration. This is so because it is precisely that right, coupled with the fact that no part of the property was shown originally to have belonged to the decedent's wife or to have originated entirely with her, which brings the property in the first instance within the purview of another subsection of the statute, namely, Section 811(e).

Since, as we have shown, the decedent by the gift made a transfer of his interest in the property and that such interest extended to the whole thereof, involving, as it did, a relinquishment by him to the donee of his right of survivorship therein, it follows that the transfer of such interest falls within the ambit of Section 811(c). Thus, the only question which remains is whether the whole or only a portion of the value of the property is includible in the decedent's gross estate. This question we shall hereafter consider under our third point.

As regards the contract, the contention of both the

taxpayer (Br. 57-58) and the friends of the Court (Br. 47-49) in effect is that a release by each of his right of survivorship does not involve a transfer of an interest in the property but only a release by each of his right of survivorship, which was merely terminated thereby. Thus, by contrast with the taxpayer's contention as regards the gift, all aspects of the conversion of the tenure of the property from a joint estate to one in common are disregarded, excepting only the release of the right of survivorship resulting from the conversion. It follows that the applicability of Section 811(c) is made to turn solely on the effect of such release. On this premise, both the taxpayer and the friends of the Court argue that there was no transfer of any interest, for such relinquishment did not, in their view, constitute a *transfer* of any *interest* which the decedent had in the property, within the meaning of the federal statute, but only a *release* of a *right* which he had therein, namely the right of survivorship.⁸

The fallacy of this contention lies in the fact that the contract converting the joint tenancy of the property into property held in common did not merely involve a release of the right of survivorship. It involved, dealt with, and destroyed the joint tenancy in its entirety, a wholly new and different tenancy being created thereby in its stead. No one would contend, we apprehend, that a conversion by contract of community property into joint property involved only the destruc-

⁸ To be sure, both the taxpayer (Br. 58) and the friends of the Court (Br. 13-15) contend that the contract was a sale by each to the other of his interest therein for a full consideration in money and money's worth within the meaning of Section 811(c). But, aside from the fact that, as we shall hereafter show under our second point such contention is without merit, it is obviously, similarly as the taxpayer's contention with regard to the gift, inconsistent with the contention of both the taxpayer and the friends of the Court that the contract involved merely a release of the right of survivorship and therefore not ^{a transfer of} an interest in the property.

tion of the power of the husband to manage the property, or the destruction of the right of the survivor to take his one-half interest in the property at the death of the other free from the claims of the deceased spouse's heirs to the whole. Similarly, no one would contend that a conversion by contract of common property into joint property was no more than the addition of the right of survivorship to the rights which each held in the property of tenants in common. The point is that, on the one hand, the conversion destroys the old tenancy completely and with it every right, title and interest which each tenant had therein, and, on the other, it substitutes a wholly different tenancy therefor. It cannot properly be said—at least not taxwise—we submit, that only one or more of the incidents of the old tenancy are destroyed and the new tenancy created solely as result thereof.

However, by way of buttressing their contention that the right of survivorship is not an interest in property, the friends of the Court argue (Br. 48) that if such right is retained, its value would not be includible in the decedent's gross estate as an interest under Section 811(a) (Appendix *infra*). But the reason that it is not includible therein under Section 811(a) is not that it is not an interest, but that it ceases at his death if his co-tenant survives him.

In this connection, the friends of the Court contend (Br. 45) that such right is substantially similar to a general power of appointment, which has been held not to be an interest in property within the meaning of Section 811(a). They point out (Br. 46) that it requires a separate provision of the statute to include in the decedent's gross estate the value of property with respect to which he possessed such power of appointment at his death, as also a separate provision for the inclusion of

such value therein in the event that he had released such power in contemplation of his death.

But the friends of the Court themselves furnish the answer to this contention. (Br. 45-46.) It is that, unlike the right of survivorship, a power of appointment is not an interest in property at all, and the property subject thereto is for this reason not includible in the decedent's gross estate under Section 811(a), or under Section 811(c) in the event it is released by him in contemplation of his death.

The friends of the Court next contend (Br. 47) that the right of survivorship is similar to the right of dower because, as they assert, such right is not regarded as an interest in property within the meaning of each Section 811(a) or Section 811(c).

But there is no possible analogy between the two rights here. The right of survivorship, whose termination at the decedent's death sweeps the property subject thereto into his gross estate under Section 811(e), is a right which resides in the decedent and is terminated only by his death. On the other hand, the right of dower (or courtesy) which is includible in the decedent's gross estate under Section 811(b) is not his right, but the right of the survivor. It is included because, taking the right of dower as an example, such right was obtained by the decedent's wife in his property as a result of her marriage to him and was then, and at all times thereafter until his death, inchoate, being converted at his death and as a result thereof into an absolute right; so that it could, in a tax sense, be regarded as a transfer thereof from him to her at his death. Thus, the reason that it is not includible in his gross estate under Section 811(a), ^{is that} ~~because~~ he does not possess that right at any time between the marriage and his death.

And, finally, the friends of the Court contend (Br. 48) that the right of survivorship, being a mere right of

expectancy, is similar to a contingent remainder which has for that reason been held not to be an interest in property within the meaning of Section 811(a) and Section 811(c). But, if we are right in our contention that the right of survivorship is more than a mere expectancy and is an interest in property, then clearly the case of a contingent remainder terminable at death presents no analogy.

However, as we have said, we are not here dealing alone with the relinquishment, termination, or transfer of a right of survivorship. We are dealing with a relinquishment, termination and transfer of a separate and distinct tenancy of property, of which the right of survivorship is only one incident, for the contract in question, by its terms, converts, and its legal effect is to convert, the joint tenancy as a whole into an entirely different tenancy.

Beyond peradventure, therefore, the contract involved a transfer of an interest in the property within the meaning of Section 811(c). This construction of the statute is, moreover, in accord with the elemental principle that a statute is so to be construed as to carry its purpose into effect. Particularly is this true with regard to statutory provisions which are enacted to prevent tax evasion. These must be fairly construed in order to effectuate their purpose. *Taylor v. United States*, 3 How. 197; *United States v. Stowell*, 133 U. S. 1; *United States v. Hodson*, 10 Wall. 395; *United States v. Graf Distilling Co.*, 208 U. S. 198; *Farmers' Loan & Trust Co. v. Bowers*, 68 F. 2d 916, 923 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582; *Armstrong, Admr. v. State, ex rel.*, 72 Ind. App. 303; *In re Fulham's Estate*, 96 Vt. 308, 119 Atl. 433.

Indeed, it is in accord with this principle that, as has already been noted in fn. 7, *supra*, the concept of the word "transfer" as used in Section 811(c) has in

the course of the years been accorded an ever wider connotation by Congress and the courts; a fact which the Supreme Court has frequently recognized. See particularly *Burnet v. Guggenheim*, 288 U. S. 280, 286-287, but also *Chase Nat. Bank v. United States*, 278 U. S. 327, 337; *Tyler v. United States*, 281 U. S. 497; *Estate of Sanford v. Commissioner*, 308 U. S. 39, 42-43.

However, the friends of the Court (Br. 31) cite *Brown v. Routzahn*, 63 F. 2d 914 (C. C. A. 6th), certiorari denied, 290 U. S. 641; *Clark v. Commissioner*, 47 B.T.A. 865 (acquiescence 1942-2 Cum. Bull. 4); and *Grasselli v. Commissioner*, 7 T.C. 255 (acquiescence 1946-2 Cum. Bull. 2), in support of their contention that a release of the right of survivorship is not a transfer within the meaning of Section 811(c).

As regards *Brown v. Routzahn*, it is to be noted that this case involved merely the renunciation by the decedent of testamentary gifts. The court reviewed the Supreme Court cases regarding transfers, including the *Chase Nat. Bank*, *Tyler* and *Guggenheim* cases, *supra*, and then said that it could not think that the purpose of the contemplation of death statute contemplated the taxing of such renunciation. In this behalf the court said (p. 917):

Specifically stated, it is our view that, had Elizabeth Brown died in January of 1920, the renunciation here involved, made the following April, could not be held to be a transfer under the statute, even though it were made in contemplation of death. If in that case the renunciation would not be a transfer, neither is it here. The decedent never owned nor had control of the property as donee. All that he had was a right to accept. Coupled with this right was an equal right to reject. Either could be exercised so long as the estate was in administration. He did reject. The government had no fixed prior right such as a precedent judgment creditor might have had. Cf. *Strom v. Wood*,

supra; *Crumpler v. Barfield & Wilson Co.*, 114 Ga. 570, 40 S.E. 808; *Schoonover v. Osborne*, 193 Iowa, 474, 187 N. W. 20, 27 A.L.R. 465. Its right, as claimed, grew out of the act said to give rise to the tax liability, the exercise of an option. What it did was to collect a tax, not upon the transfer of an interest in property, but upon the exercise of a right to refuse a gift of property. This we think it had no right to do.

Thus, it is obvious that the court was influenced in its decision by the fact that, unlike in the case here, the decedent in that case had never owned or controlled the property there in question; that all he had was a right to accept the testamentary gift, with which was merely coupled an equal right to reject it. We submit that this case presents no analogy to the situation here.

As regards the *Clark* case, it is apparent that the friends of the Court have overlooked the fact that it is in apparent conflict, in principle at least, with the decision of the Supreme Court in *Burnet v. Guggenheim*, *supra*. The *Clark* case is, moreover, also in conflict in principle with both of the *Richardson* cases, decided by the Second Circuit, namely, *Richardson v. Commissioner*, 121 F. 2d 1, certiorari denied, 314 U.S. 648, which involved the question as to whether the income from property subject to a donated power was includible in the taxpayer's gross income, and *Richardson v. Commissioner*, 126 F. 2d 562, which involved the taxation as a gift resulting from the relinquishment of the power. In the last mentioned case, the taxpayer relied heavily upon the *Clark* case as being one on all fours with the *Richardson* case. But the Second Circuit did not even mention the case. Moreover, as we pointed out in our brief in that case, the Commissioner's acquiescence therein was not based upon an acceptance of its principle, but upon other considerations. We copy in the margin the substance of the explanation

which we made of the acquiescence by way of a footnote in the Government's brief in the *Richardson* case, adding a brief explanation thereto of the acquiescence in the *Grasselli* case, which had not been decided at the time that the *Richardson* case was decided. Such explanation, however, seems adequately to distinguish the situation presented therein from the situation here."

As we have heretofore said, in the *Guggenheim, Chase Nat. Bank, Tyler* and *Sanford* cases, *supra*, a broad connotation was given to the word "transfer" in connection with its use in transactions falling within other than the contemplation of death provision of the stat-

⁹ The basis of the Commissioner's acquiescence in the *Clark* case is as follows: Section 302(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, relating to estate tax, is limited by Section 302(f). But Section 501 of the Revenue Act of 1932, c. 209, 47 Stat. 169, relating to gift taxes, which may be said to be the gift tax counterpart of the estate tax Section 302 (a), has no limiting section comparable to Section 302(f) of the estate tax provisions. Hence, the Commissioner considered that the majority of the Board erroneously decided the case by considering Section 302(a) and (f) and such cases as *Helvering v. Grinnell*, 294 U. S. 153. On the other hand, while Section 452(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, expressly makes transfers like that in the *Clark* case taxable, it also provides by Section 452(c) that such transfer is exempt from the tax (even if the release is made under prior law), provided that it is made before January 1, 1943. Thus, while the transfer was deemed taxable under Section 501 of the 1932 Act, because the donee had relinquished the right to capture the corpus, it was thought to fall within the retroactive provisions of Section 452(c) of the 1942 Act, exempting it from the otherwise applicable provisions of Section 452(a) of that Act.

As regards the reason for the acquiescence of the Commissioner in the decision of the Tax Court in the *Grasselli* case, the Bureau file discloses that the taxpayer in that case neither exercised nor released the power of appointment there involved, but had simply by inaction permitted the trustee to pay the income as directed by the settlor. In these circumstances it was concluded that the unexercised power to defeat a gift did not constitute the making of one in the absence of express legislative command. Thus, the case apparently presents a situation which in principle is similar to that presented in the case of *Brown v. Routzahn*, *supra*, upon which the taxpayer also relies and which we have already discussed in the body of the brief.

ute. It has, however, also been frequently applied in connection with its use in the latter provision.

Thus, for example the Supreme Court in *City Bank Co. v. McGowan*, 323 U. S. 594, held that orders of the Supreme Court of New York in a guardianship proceeding whereby the court distributed a large portion of an incompetent's estate to the natural objects of her bounty who would succeed to it in any event upon her death, because they did not want to wait until she died, were transfers made by *her* in contemplation of her death, and that, even though the court had no power under state law to make a disposition of an incompetent's property in the nature of a disposition by will. Mr. Justice Roberts speaking for a unanimous Court said (p. 599) that it seemed to the Court to be "sticking in the bark" to hold otherwise.

Another instance may be found in the case of *First Trust & Deposit Co. v. Shaughnessy*, 134 F. 2d 940 (C.C.A. 2d), certiorari denied, 320 U. S. 744, where property had been given by the decedent to his wife with the understanding that she should set up an insurance trust, which she did, although she was under no legal obligation to do so, and could have converted the property to her own use. Judge Learned Hand, also speaking for a unanimous court, said that the transfer in trust of the property which she had made in accordance with such agreement was a transfer attributable to him, because, while she need not have made it, still it was made pursuant to an understanding between the decedent and her that it should be made. Moreover, in these circumstances the court held *her* transfer of the property to have been made by the decedent in contemplation of his death. The reason is that no life motive on *his* part was shown to have existed therefor.

In still another case, *Vanderlip v. Commissioner*, 155 F. 2d 152, the same court unanimously held, in an

opinion also written by Judge Learned Hand, that a transfer made by the decedent in trust of life insurance policies against which he had borrowed the full loan value, so that they then had substantially no surrender value, was a transfer by him of the *proceeds* of the policies at his death, although the premiums had, at least in part, been thereafter paid with the proceeds of subsequent loans made by the trustee against the policies.

And the Third Circuit, in the case of *United States v. Tonkin*, 150 F. 2d 531, 533, certiorari denied, 326 U. S. 771, held that a decedent past insurable age, who had purchased a paid-up life insurance policy in conjunction with an annuity contract, had thereby made a transfer of the proceeds of the policy and contract at his death to the ultimate policy and contract beneficiaries in contemplation of his death.

Moreover, the same court affirmed *per curiam* a decision of the District Court for the Eastern Pennsylvania in the case of *Commonwealth Trust Co. of Pittsburgh v. Driscoll*, 137 F. 2d 563, certiorari denied, 321 U. S. 764, in which the District Court had held (50 F. Supp. 249) that the decedent had made a transfer in contemplation of death where he and his wife, holding property conveyed by him to himself and her as tenants by the entirety, had transferred it to her alone for no other apparent reason than to avoid the impact of the federal estate tax. We regard this case as one in point here.

As we have already said, whether the transfers by the decedent of his interest in the joint property require the inclusion of the value of the property subject thereto in its entirety in his gross estate at his death, because they were made in contemplation of his death, will be discussed in our third point, *infra*. It is necessary first, however, to turn aside to dispose of the contention of both the taxpayer and the friends of the Court that the contract entered into between the decedent and his wife

to convert their joint interests in the balance of their property into common property was a sale of the interest of each to the other for an adequate and full consideration in money or money's worth, within the meaning of Section 811(c).

II

The contract entered into between the Decedent and his wife to convert their joint interests in the balance of their property into common property was not a sale of the interest of each therein to the other for an adequate and full consideration in money or money's worth, within the meaning of Section 811(c) of the Code

There are two answers to the contention made by both the taxpayer (Br. 65-67) and the friends of the Court (Br. 13-15) that the transfer of the interest of each in the balance of their jointly owned property to the other, as a result of the contract, was based upon an adequate and full consideration in money or money's worth within the meaning of Section 811(c). The first answer involves state and the second federal law.

The first answer is to be found in the briefs of both the taxpayer and the friends of the Court. It lies in the fact, that as the taxpayer points out (Br. 44) the "termination or severance" of the joint tenancy may be effected by its unilateral release by one joint tenant in favor of the other. And, similarly, by the fact that, as pointed out in the brief of the friends of the Court (p. 8), either joint tenant may sever the tenancy by conveying his interest therein to a third party, and that he may do this even without the knowledge or consent of the other joint tenant; the result being that the grantee becomes a tenant in common with the other original joint tenant. Moreover, as further pointed out by the friends of the Court (Br. 9), an immediate reconveyance by the third party to the grantor makes the latter a tenant in common with his original co-tenant. Of course, no consideration of any kind is required to

effect these results. Obviously, therefore, there is not the slightest basis for any contention that, if such result is effected by an agreement instead of by the unilateral action of one of the parties, such agreement is a sale or that it is to be regarded as being one "for an adequate and full consideration in money or money's worth" within the meaning of Section 811(c).

The second answer is found in the decision of the Supreme Court in the case of *Merrill v. Fahs*, 324 U. S. 308. In support of their contention that the contract involved a sale by each to the other of his interest in the property, both the taxpayer (Br. 66) and the friends of the Court (Br. 19-20), cite two cases decided by the Third Circuit, namely, *Ferguson v. Dickson*, 300 Fed. 961, certiorari denied, 266 U. S. 628, and *McCaughn v. Carver*, 19 F. 2d 126, in both of which that court held release of a dower right to be a sale thereof supported by a "fair consideration" within the applicable provision of the statute. To be sure, at least the friends of the Court point out (Br. 21) that these cases have, as they say, been "*legislatively reversed.*" (The italics are those of the friends of the Court.) They argue, however, that such reversal merely related to the holding of the court that such release was based upon a "fair consideration;" they assert that it did not extend to the holding that the release was a "sale." But this is obviously a pointless argument. What the taxpayer and the friends of the Court must here show is that, even if the release of dower or of any other marital interest in property could be called a sale (which it obviously cannot unless it is made upon the payment in money or money's worth), it is one "for an adequate and full consideration in money or money's worth," as required by Section 811(c).

In any event, this contention seems to us to find conclusive answer in the decision of the Supreme Court in

Merrill v. Fahs, *supra*, pp. 312-313, and particularly in the Court's conclusion therein that, without the addition to Section 811(b) of the Congressional direction that a release of such right shall not be considered to any extent a consideration "in money or money's worth," Congress undoubtedly intended the requirement of "adequate and full consideration" to exclude relinquishment of dower and of the marital rights with respect to the estate tax. See also *Taft v. Bowers*, 304 U. S. 351, upon which this Court relied in *Giannini v. Commissioner*, 148 F. 2d 285, 287.

In the *Giannini* case, this Court held that the existence of a legal consideration under local law in family arrangements was immaterial under tax laws. It is to be noted that in the case at bar the Tax Court relied upon the *Giannini* case, among others, in support of its finding and conclusion that the contract here in question was merely a family arrangement and not to be distinguished for the purposes in hand from that involved in the *Giannini* case.

What seems inexplicable is that, in the circumstances, the friends of the Court neither cited nor discussed the *Merrill*, *Taft* or *Giannini* cases, particularly the *Giannini* case which, as stated, was relied on by the Tax Court in its opinion and furthermore was briefed and argued on behalf of the taxpayer in this Court by one of their number.

III

The value of the whole property subject to the gift and contract is includible in the Decedent's gross estate

Section 811(c) provides that there shall be included in the decedent's gross estate the value at the time of his death of all property to the extent of any interest therein of which he has made a transfer at any time—in contemplation of his death.

It is to be noted that the interest referred to is that

which is *transferred*. But that was the interest which the decedent had in the property as a joint tenant at the time of the transfers. It was not until both transfers had been consummated that the disposition of all of his interest as a joint tenant in the property had been effected, and that by the contract he had acquired an interest in common with his wife in that portion of it which was subject thereto. Thus the taxpayer's contention that, at best, the decedent by the gift could have made a transfer in contemplation of his death of only one-half of the property which was subject to the gift, and by the contract of only one-half of the balance which was subject thereto (which in any event was includible in his gross estate under Section 811(a)), disregards the nature of the interest he had in the property and had transferred; for such contention, in effect, assumes that such interest was no more than a half interest held by him therein in common with his wife. Clearly, Section 811(c) is not to be circumvented by such hocusing.

To be sure, as the friends of the Court point out in the second footnote found on page 32 of their brief, the Supreme Court in *United States v. Jacobs*, 306 U. S. 363, 371, said that until the death of her co-tenant, the wife could have severed the tenancy and thus escaped the application of the estate tax of which she complained. But, obviously, the Court did not have the contemplation of death provision of the statute in mind. It is readily conceivable that leeway must be left to terminate a joint tenancy without risk of incurring the death tax where such severance would subserve only purposes wholly unconnected with the passage of the property at the death of the tenant with whom it originated. Of course, the contemplation of death provision has nothing to do with such transfers. As we have already said, it was thereby intended only to reach substitutes for

testamentary dispositions and thus to prevent the evasion of the tax.

But, in order effectually to do this, it must of necessity be able to reach the whole of the property held in joint tenancy, where the joint tenant with whom it originated has made a transfer of his interest therein in contemplation of his death.

Moreover, such construction of Section 811 does no violence to the joint tenancy concept, or to the Section 811(c) concept of the interest which the decedent has therein and of which he has made a transfer in contemplation of his death.

As was pointed out by Mr. Justice Black in the *Jacobs* case (p. 370), there is such substantial similarity between joint tenancy and tenancy by the entirety as to have moved Congress to treat them alike. The Supreme Court discussed the incidents of ownership in both tenancies, adverting to the fact that in the one as in the other complete ownership in each tenant extended to the whole, quoting in a footnote as illustrative thereof the following description of a joint tenancy made by the Supreme Court of Illinois in *Deslauriers v. Senesac*, 331 Ill. 437, 440; 163 N. E. 327:

The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession.

To this the Supreme Court added a quotation from *Topping v. Sadler*, V Jones 357, 360 (N.C.), cited in a note in 30 L.R.A. 305, to the effect that the learning in the books merely shows that in case of a con-

veyance to husband and wife there is a fifth unity, that of person.¹⁰

Thus, though based on a common law fiction, it may correctly be said that the ownership of each tenant in jointly owned property embraces the whole. If so, Congress obviously not only had the power for the purpose of Section 811(c) to attribute the ownership of the whole to the decedent, but, in the light of its purpose to prevent the evasion of the tax by a transfer thereof in contemplation of death, must be deemed to have exercised such power by the enactment of that section.

Nor does such construction of Section 811(c) do violence to the definition of the word "interest" as used in Section 811(c); for, as we have shown, the interest which the decedent had therein actually extended to and was an interest in the whole.

We, therefore, submit that for the purposes of the contemplation of death provision, it is entirely proper to view the decedent's interest in the jointly held property which originated wholly with him as being an interest in property which is subject only to defeasance in the event he predeceased his wife. Cf. *Helvering v. Hallock*, 309 U. S. 106.

Moreover, if, in order to effectuate its purpose to reach substitutes for testamentary dispositions and thus to prevent the evasion of the tax, the contemplation of death provision of Section 811(c) may be so

¹⁰ We believe that the quoted definition of joint tenancy is no different from that under California law. See the decision of this Court in *Guinn v. Commissioner*, 54 F. 2d 728, 729, which was affirmed by the Supreme Court in 287 U. S. 224. In any case, whatever difference there may be is wholly immaterial so far as concerns the application of the federal estate taxing statute thereto. The reason is that both Section 811(c) and Section 811(e) are intended to have nationwide application with the result that differences in state law are immaterial. See *Estate of Rogers v. Commissioner*, *supra*, p. 414, and *Helvering v. Stuart*, *supra* p. 161.

construed as to reach a transfer made by the decedent's wife (as it was in the case of *First Trust & Deposit Co. v. Shaughnessy*, *supra* (134 F. 2d 940)), or the proceeds of insurance created by the action of the trustee subsequent to the transfer (as in *Vanderlip v. Commissioner*, *supra* (155 F. 2d 152)), or the proceeds of the insurance on the life of a non-insurable person, together with the residue of an annuity contract required to be taken out by the insured (as in *United States v. Tonkin*, *supra* (150 F. 2d 531)), there can, obviously, we think, be no objection to construing such provision here so as to effectuate its purpose by requiring the inclusion of the entire value of the property in the decedent's gross estate. And, if it is "sticking in the bark," as the Supreme Court said in *City Bank Co. v. McGowan*, *supra* (323 U. S., p. 599), to contend that by Section 811(c) Congress did not intend to reach transfers of an incompetent ward's property made by a state court in contemplation of her death, but actually without power to do so, certainly it is "sticking in the bark" to contend that Congress did not thereby intend to reach a transfer of jointly held property which was so made.¹¹

In other fields of federal law it has frequently been held that a word or phrase used in the statute should be given a wide connotation in order not to defeat the purpose of the statute. This is so whether it is used in a civil or criminal statute. See, e.g., *United States v. Giles*, 300 U. S. 41, where entries in bank books made

¹¹ Similarly, the Supreme Court has justified a broad construction of the income tax provisions in order to prevent the evasion of the income tax. See, e.g., *Helvering v. Clifford*, 309 U. S. 331, where the income of short term trusts was held attributable to the grantor; *Higgins v. Smith*, 308 U. S. 473, where the income of a corporation was held to be attributable to its sole stockholder; *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293, where the entire income of a family partnership was held attributable to the husband and father of the other members thereof.

by an innocent person were held attributable to another who had caused them to be made; *United States v. Corbett*, 215 U. S. 233, where the Court denied the defendant's contention that the Controller of the Currency, to whom a false report had directly been made, was not an agent appointed to examine the affairs of a bank, within the meaning of the applicable statute. In *Sacramento Nav. Co. v. Salz*, 273 U. S. 326, the Supreme Court had occasion to define the word "vessel" in the phrase "vessel importing merchandise," so as to include the combination of a vessel and barge, the latter containing the merchandise being transported, so as to relieve the owner of the vessel and barge from liability for negligence in handling the vessel as a result of which the merchandise was lost. The statute limited the liability of the owner of a vessel transporting merchandise to negligence in respect of making it seaworthy and properly manning, equipping and supplying it. And, in *Puerto Rico v. Shell Co.*, 302 U. S. 253, 259, the Supreme Court held that the utmost degree of liberality is required in the construction of the word "territory" even in a criminal statute.

It is moreover of no moment that, so construed, the word "interest" has a broader significance than it has in Section 811(a). The contention of the friends of the Court that the word must be regarded as having identical meaning in both subsections, as a basis for their contention that it is a word of art as used throughout the section, is unconvincing.

It is, of course, well settled that, though it is a natural presumption that identical words used in the same statute are intended to have the same meaning, this is not a rigid rule and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they are employed in different parts of the Act

with different intent. This is particularly so where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of legislative power exercised in one case is broader than that exercised in another. In such case the meaning may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed and of the circumstances under which the language is employed. *Puerto Rico v. Shell Co.*, *supra*, (302 U. S., p. 265); *United States v. Raynor*, 302 U. S. 540, 547-548; *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433-434. In the last cited case, the Court went on to say that it was not unusual for the same word to be used with different meanings in the same Act, and ~~there~~^{there} was no rule of statutory construction which precluded the courts from giving to the word the meaning which the legislature intended it should have in each instance. The Court cited as an example the fact that the meaning of the word "legislature" used several times in the Federal Constitution differed according to the connection in which it was employed, depending upon the character of the function which that body in each instance is called upon to exercise, citing *Smiley v. Holm*, 285 U. S. 355. See also *Helvering v. Stockholms &c. Bank*, 293 U. S. 84, where the Court rejected the taxpayer's contention that a comparison ought to be made between the meaning of the words "gross income" as contained in Section 213(b)(4) of the Revenue Act of 1926 and the meaning of the same words as used in Section 217(a) thereof, citing and quoting from the *Atlantic Cleaners & Dyers* case. Thus the everliving truth of what Mr. Justice Holmes said in *Towne v.*

Eisner, 245 U. S. 418, 425, is strikingly again illustrated here:

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Thus, here, subsection (a) of Section 811 is self-contained and deals only with interests in the ordinary sense which the decedent had in property at the date of his death. Every other subsection of Section 811, however, except Section 811(c), deals with interests or rights in property which are not includible in the decedent's gross estate under subsection (a), at least not to the extent provided therein. By contrast, subsection (c) is a special provision, more in the nature of a catch-all, designed generally to sweep into the gross estate interdicted *inter vivos* transfers of interests in property which would otherwise be includible not only under subsection (a), but under other subsections as well. Thus, for example, it has repeatedly been held that transfers of life insurance normally includible under subsection (g), which were made in contemplation of death, are includible under subsection (c). See, e.g., *First Trust & Deposit Co. v. Shaughnessy*, *supra* (134 F. 2d 940); *Vanderlip v. Commissioner*, *supra* (155 F. 2d 152); *Davidson's Estate v. Commissioner*, 158 F. 2d 239 (C.C.A. 10th); *Thomas v. Graham*, 158 F. 2d 561 (C.C.A. 5th), as also Section 81.25 of Treasury Regulations 105.¹²

In the very nature of things, the word "interest"

¹² The fact that Congress specifically provided for the inclusion in the gross estate of property subject to certain powers which were relinquished in contemplation of death does not detract from these considerations. As we have heretofore pointed out under our first point, *supra*, these involve *rights* in the property rather than *interests* therein.

would be used with broader meaning in subsection (c) than in subsection (a).

Since the friends of the Court leave us at this point, we are now able to evaluate their contentions in retrospect. The outstanding fact with regard thereto is that they have undertaken to construe the contemplation of death provision of the statute without giving consideration to the fact that it is such. And, in the course of so doing, they have taken the words "interest" and "transfer," as well as the phrase "for an adequate and full consideration in money or money's worth," out of their setting and undertaken to construe them separately and apart from their context. As Mr. Justice Holmes aptly remarked of similar conduct on the part of the taxpayer's counsel in *Edwards v. Chile Copper Co.*, 270 U. S. 452, 455, "we cannot let the fagot be destroyed by taking up each item separately and breaking the stick." Moreover, the friends of the Court have attempted to do this in this case solely in order to defeat the manifest purpose of the contemplation of death provision of Section 811(c) to prevent evasion of the estate tax by *inter vivos* transfers made in contemplation of death. As we have said, the decedent in this case disposed of all of his earthly possessions by the gift, the contract and his will, and the friends of the Court do not even pretend that such disposition was not made by him in contemplation of his death.

And this brings us to the last and what, as we have already said, we regard as the primary question in this case, namely, whether the transfers were made by the decedent in contemplation of his death.

IV

The gift and contract were substitutes for testamentary dispositions and were made by the Decedent in contemplation of his death within the meaning of Section 811(c)

In *Koch v. Commissioner*, 146 F. 2d 259, this Court recognized that whether a transfer is made in contemplation of death is, generally speaking, a question of fact and that the Tax Court rather than the Court of Appeals must draw the inferences from the facts and choose between conflicting ones. In support, the Court cited numerous authorities, including the case of *Colorado Bank v. Commissioner*, 305 U. S. 23. As we pointed out in our brief in the *Koch* case, this is so whether the trier of the fact is the Board of Tax Appeals (now the Tax Court), as it was in the *Colorado Bank* case, or the District Court, as it was in *McCaughn v. Real Estate Co.*, 297 U. S. 606. See also *Flack v. Holtegel*, 93 F. 2d 512 (C. C. A. 7th), and *Oliver v. Bell*, 103 F. 2d 760 (C. C. A. 3d). While the District Court cases above-mentioned were tried before the federal rules of civil procedure were adopted, findings made on conflicting evidence by a District Court and inferences drawn therefrom since the adoption of the rules should not be rejected by the Court of Appeals unless clearly wrong. *Walling v. General Industries Co.*, 330 U. S. 545, 550. Of course, the same rule now obtains as regards findings of the Tax Court under Section 1141(a), as amended by Section 36 of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess.

But the case at bar is not one in which the findings could by any stretch of the imagination be said to be clearly erroneous. To the contrary, the evidence in the case shows that we run the entire gamut of reasons for holding that the transfers in question were made by the decedent in contemplation of his death within the meaning of Section 811(c).

Thus, the transfers were made by him in contemplation of his death in the basic meaning of the phrase; that is, they were made in anticipation of his death in fear or expectation that it might not be long delayed. Secondly, the transfers were substitutes for a testamentary disposition of the property, and with the decedent's will constituted an integral part of a final disposition of all of it. And, finally, there is no evidence to justify a finding that, in making the transfers the decedent was dominated by a life purpose or purposes. On the other hand, the evidence beyond question sustains the finding that the gift, contract and will constituted an integrated transaction designed for the purpose of making a final disposition of all of the decedent's property and to do so in order to evade the federal tax, at least in part.

As regards the first of these reasons, it appears that, although the decedent and his wife contemplated making some sort of a gift to their son as early as the first part of September, 1943, they originally intended to make only a relatively small one, not more than sufficient to enable them to pay his debts, whatever they were. Even when the decedent and his wife consulted the lawyer Triplett in the latter part of September and were by him advised that they might make a gift of as much as \$33,000 which would be free from the gift tax, they left without having made a gift, or any arrangements for making it, and with the statement (attributed to the decedent's wife) that they had not intended to make that large a gift, but only of about one-half of that amount. It was not until after the decedent had been taken ill and had consulted a doctor that, within a few days thereafter, he and his wife went to see the attorney without even an appointment and arranged to make a gift of that amount—exactly of \$33,526.54. This was on November 9th. The decedent had consulted the

doctor on November 7th and before that on October 27th. His visits to the doctor thereafter continued apace. On November 18, 1943, he was examined again, and on the next day he made the gift. In the meantime, the attorney had suggested the conversion of the balance of the property from joint to common, so as to avoid the federal estate tax upon the whole thereof in the event of the decedent's death. On November 21st, the decedent entered a hospital for an extended examination, remaining there until the 24th and going from there directly to a conference with the attorney which the decedent's son had arranged for by a telephone call made from the hospital.¹³

Since the gift had then already been consummated, no reason for such conference at the time is suggested or apparent other than the signing of the contract to convert the balance of the joint property into common property and to arrange for the making of the wills. Indeed, the contract was signed at that meeting and the provisions of the new wills were determined upon. At this conference also a number of deeds of property to the son were executed by the decedent and his wife. It is to be noted that the diagnosis made by the doctors whom the decedent had up to that time consulted was "obstructive jaundice" and "probable ca of pancreas." (R. 46.)

Two days later, on November 26, 1943, a letter was written identifying the securities which were the subject of the gift and four days after, that is on November 30th, the wills were executed.

While it does not affirmatively appear that the doctors had advised the decedent of the entire diagnosis, still it is apparent that the decedent was concerned

¹³ The decedent apparently returned to the hospital, for he was not discharged therefrom until November 25, 1943. The hospital record of that day shows that he was then sent home, to return later for completion of work. (R. 45.)

about his condition. For, while he did not tell the attorney what the doctors had said to him about it, except that he had something wrong with his gall-bladder (R. 194) and that the bile was not going through (R. 200), he further said that the X-rays did not show anything, and that he did not think the doctors knew what they were talking about. Clearly, this could not have referred to what they had said about his gall-bladder, for his jaundiced condition alone amply supported the doctors' statement with reference to that. The decedent's statement that he did not think the doctors knew what they were talking about must therefore have had reference to what they told him otherwise about his condition, and this could only have been that they suspected cancer of the pancreas, from which, indeed, he was actually suffering.

In any event, within ten days after he had made his will, he entered another hospital under the care of another doctor and with the same ailments, namely, jaundice of uncertain origin and cancer of the pancreas. This doctor apparently operated only on the gall-bladder in order to drain it and thus to relieve the jaundice. In a delirium which followed, the decedent tore the drain out, thus necessitating a second operation which was had, and a few days later he died.

The cases are legion in which transfers made by decedents in conditions of age and health similar to those here, were found to have been made in contemplation of death, such findings being sustained by the appellate courts on the ground that the evidence was sufficient to do so. See, e.g., the decision of this Court in *Koch v. Commissioner*, already referred to, as well as those in the cases therein cited, such as *Flack v. Holtegel, supra* (93 F. 2d 512); *Oliver v. Bell, supra* (103 F. 2d 760); *Smails v. O'Malley*, 127 F. 2d 410 (C.C.A. 8th); *McGrew's Estate v. Commissioner*, 135 F. 2d 158

(C.C.A. 6th); also *Myers v. United States*, 2 F. Supp. 1000 (C. Cls.); *Gregg v. United States*, 13 F. Supp. 147 (C. Cls.); *Harris Trust & Savings Bank v. United States*, 29 F. Supp. 876 (C. Cls.); *Griffith v. United States*, 32 F. Supp. 884 (C. Cls.); *Russell v. United States*, 38 F. Supp. 438 (C. Cls.); *Central Nat. Bank of Cleveland v. United States*, 41 F. Supp. 239 (C. Cls.); *Stanley v. United States*, 46 F. Supp. 988 (C. Cls.). See also *Kengel v. United States*, 57 F. 2d 929 (C. Cls.), which presents the interesting phenomenon of transfers shown by direct evidence to have been made by the decedent in anticipation of his death. Of course, as stated in a number of the decisions of the Courts of Appeals, the fact that the appellate court might have reached a different conclusion if it had been the trier of the facts in these cases is wholly immaterial.

The second reason why the finding that the transfers were made by the decedent in contemplation of his death is conclusive is that they were substitutes for testamentary dispositions of a part of his property and formed an integral part of a complete disposition thereof in conjunction with the wills. While a gift of some property to the son was first contemplated, the fact of the matter is that it was of a relatively small amount. What is significant, however, is the fact that the ultimate making of a gift of a larger amount than was originally contemplated appears to have been the occasion for the decedent's giving consideration to a final disposition of all of his property. That the gift was finally consummated in the largest amount that could be made free of the gift tax is significant in that this indicates the decedent had no idea of ever making another *inter vivos* gift, but that he intended to dispose of the balance of his property by the contract and his new will.

Whether step transactions, such as those here, con-

stitute a single integrated scheme for a complete and final disposition of one's property is itself, obviously, a question of fact. And with respect to it, the finding of the Tax Court is conclusive if there is substantial evidence to sustain it. *Dobson v. Commissioner*, 320 U. S. 489, 502, citing Randolph E. Paul's classic study on step transactions. The *Dobson* case was followed on this point by this Court in *Heller v. Commissioner*, 147 F. 2d 376, 378, and again in *Commissioner v. Rainier Brewing Co.*, 165 F. 2d 324, 325. It is to be noted that in the *Heller* case, the pertinent part of the *Dobson* opinion is quoted and that this Court italicized for emphasis the following portion thereof to the effect that "the Tax Court's selection of the course to follow is no more reviewable than any other question of fact."

Other courts have likewise followed the *Dobson* case in this respect. See, e.g., *Hunter v. Commissioner*, 140 F. 2d 954, 955 (C.C.A. 5th); *Commissioner v. Breyer*, 151 F. 2d 267, 272 (C.C.A. 3d); *Okonite Co. v. Commissioner*, 155 F. 2d 248, 251 (C.C.A. 3d); *Thermoid Co. v. Commissioner*, 155 F. 2d 589, 591 (C.C.A. 3d). Indeed, long before the *Dobson* case was decided, Judge Learned Hand said in *Helvering v. New Haven & S. L. R. Co.*, 121 F. 2d 985, 988:

As for the effort of the Commissioner to atomize the plan, as it were; i.e., to separate it into its several steps and treat the last as though it stood alone, it has been repeatedly repudiated. *Prairie Oil & Gas Co. v. Motter*, 10 Cir., 66 F. 2d 309; *Basick v. Commissioner*, 2 Cir., 85 F. 2d 8; *Helvering v. Elkhorn Coal Co.*, 4 Cir., 95 F. 2d 732; *Snowden v. McCabe*, 6 Cir., 111 F. 2d 743.

It is particularly worthy of note here that in *Allen v. Trust Co. of Georgia*, 326 U. S. 630, 637, the Supreme Court in a contemplation of death case refused to disturb a finding of the District Court, which the Fifth

Circuit had accepted (149 F. 2d 120), that transfers in trust made by the decedent in 1925, additions made thereto by him nine years later, in 1934, and a release of a power to amend the trusts, made by him three years later, in 1937, constituted an integrated transaction.

Thus, the making of a larger gift than one originally contemplated is not to be accounted for primarily on the ground that the decedent and his wife desired to give their son some financial relief by way of assuring him of additional income. It is to be accounted for only by the fact that the gift of such amount was tax-free and that it fell within the wider scheme for a complete and final disposition of all of the property. The only reasonable inference to be drawn from all the facts is that the decedent had the final disposition of his property in mind when he made the gift and that his dominant purpose for making the gift and contract, judged in the light of his age and health and the situation in which his family was placed, and the fact that at the same time he disposed of the balance of his property by a new will, was to make a final disposition of his property so as to put his house in order against the possibility of his dying in the not too distant future. There can be little doubt, therefore, that he made the transfers "in contemplation of his death," as that phrase has been defined by the Supreme Court not only in *United States v. Wells*, *supra* (283 U. S. 102), but in *City Bank Co. v. McGowan*, *supra* (323 U. S. 594); and in *Allen v. Trust Co. of Georgia*, *supra*, (326 U. S. 630), in which the Supreme Court undertook to clarify the definition made thereof by it in the *Wells* case. See also in this connection *Farmers' Loan & Trust Co. v. Bowers*, *supra*, (68 F. 2d 916 (C.C.A. 2d), certiorari denied, 293 U. S. 565; 296 U. S. 649; 299 U. S. 582); *Updike v. Commissioner*, 88 F. 2d 807 (C.C.A. 8th), certiorari denied, 301 U. S. 708; *In re Kroger's Estate*, *supra* (145 F. 2d 901

(C.C.A. 6th), certiorari denied, 324 U. S. 866); *Pate v. Commissioner*, 149 F. 2d 669 (C.C.A. 8th); *Thomas v. Graham, supra* (158 F. 2d 561 (C.C.A. 5th)); *Humphrey's Estate v. Commissioner*, 162 F. 2d 1 (C.C.A. 5th), certiorari denied, 332 U. S. 817; *O'Neal's Estate v. Commissioner*, 170 F. 2d 217 (C.C.A. 5th); *Scofield v. Bethea* (C.C.A. 5th), decided November 9, 1948, not yet reported. Thus, in the case of *O'Neal's Estate, supra*, the Fifth Circuit said (p. 220):

Moreover, it has been repeatedly held that where a decedent creates a substitute for a testamentary disposition of his property, instead of permitting it to pass under his will or under the intestacy laws, he is thereby making a transfer in contemplation of death within the meaning of the statute.

citing a number of the Supreme Court and other cases above cited.

The third reason is that the taxpayer has wholly failed to show a like motive for the dispositions the decedent had made, even assuming that it was possible to do so. The only ^{specific} motive which appears is that of tax avoidance and that is apparently insufficient. *Allen v. Trust Co. of Georgia, supra*; *Farmers' Loan & Trust Co. v. Bowers, supra* (68 F. 2d 916); *First Trust & Deposit Co. v. Shaughnessy, supra* (134 F. 2d 940). As the Fifth Circuit said in the case of *O'Neal's Estate* already cited and quoted from (pp. 219-220):

In view of his advanced age and simultaneous execution of the new will at the time the trusts were created, the burden of proof to establish a motive which would exclude the transfer to the wife was upon his estate, and it has clearly failed to meet that burden.

citing not only the *First Trust & Deposit Co.* case, but also the *Farmers' Loan & Trust Co.* case, *supra*.

The taxpayer's attempt to justify the gift as tax-free because, in its view, it was motivated by a desire to give additional income to the son, not only disregards the fact that the gift has been found by the Tax Court to have been a part of an integrated transaction for the final disposition of all of the decedent's property, but the fact that, if the transfer is shown to be within the statute, the co-existence of a possible life motive with the dominant death motives therefor does not suffice to remove it therefrom. Sight should not be lost of the fact that the statute requires the inclusion in the gross estate of transfers which are made "in contemplation of death," not alone those which are *solely* so made. Thus, if, as here, the tax evasion motive plays any substantial part in the making of the transfer, it may—indeed it should—properly be regarded as falling within the ambit of the statute. This is so even in a criminal case. For, in this behalf, the Supreme Court said in *Spies v. United States*, 317 U.S. 492, 499:

If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

Similarly, in a correlated field of tax law, the Supreme Court has *sua sponte* announced and applied precisely that principle. Reference here is to the case of *Helvering v. Stock Yards Co.*, 318 U.S. 693. In that case, the Court said that the mere existence of a purpose in the taxable year to avoid the surtax on its sole stockholder, motivating the accumulation of its gains and profits beyond the reasonable needs of its business, subjected the corporation to the fifty per cent penalty tax, even though the original purpose of the accumulation on his part, which was to gain control of the Chicago Stock Yards enterprise, long antedated the original statute and persisted in the taxable year. In this behalf Mr.

Justice Roberts, speaking for a unanimous Court, said (p. 699):

The Board's conclusion may justifiably have been reached in the view that, whatever the motive when the practice of accumulation was adopted, the purpose of avoiding surtax induced, or aided in inducing, the continuance of the practice.

Even long prior thereto, however, both federal and state courts had so applied the contemplation of death statute. Thus, for example, years ago, Judge Cant of the District Court of Minnesota in *Anneke v. Willcuts*, 1 F. Supp. 662, stated what he regarded the rational solution of the problem, which he deemed justified under principles laid down in the *Wells* case. After having pointed out that a purpose to avoid the estate tax brought a transfer so motivated within the statute, he said:

The past policy of the grantor, or his having considered making the particular transfer for some time in advance concurs with the circumstance that the transfer is made in contemplation of death. If the latter is one of the substantially inducing elements entering into the transfer, the tax will attach. If the rule were otherwise, a man known to be suffering from a progressive and incurable malady, and who had not long to live, but who had such a policy or plan, might continue with the distribution of his estate up to the day of his death, and all such distributions escape the payment of a tax. There have already been too many cases which have nearly approached a holding as reprehensible as that would be. *No matter what the policy, and no matter what the plans, if there was such indefiniteness or uncertainty in connection therewith, that one of the substantially inducing causes or motives for closing the matter when it was closed, was the contemplation of death, the reason for the tax then applies and it would not be within the*

power of the court to give relief therefrom. [Italics supplied.]

State court decisions are in accord. Thus in *Dommerich v. Kelly*, 132 N. J. Eq. 220, the court in that connection said (p. 225):

It may be supposed that there are frequently a variety of desires or motives of gradational persuasibility which cooperate to induce a donor to make *inter vivos* transfers. It is not a requisite of taxability that contemplation of death should have been the sole motive for the transfers.

citing numerous authorities. And *In re Hartford*, 122 N. J. Eq. 489, affirmed sub nom. *Hartford v. Martin*, 120 N.J.L. 564, affirmed, 122 N.J.L. 283, the same court put the matter this way (p. 491):

Furthermore, even if the desire aforesaid [to perpetuate control of stock in the decedent's two sons] was *an* impelling motive for the transfer, and one without which the transfer would not have been made, it is nevertheless clear that it was not the only impelling motive for so much of the transfer as constitutes the "testamentary disposition;" and that, for that part of the transfer, the desire and intent to accomplish an ultimate disposition and distribution of his estate in lieu of a testamentary disposition in that behalf, was an impelling motive without which such ultimate disposition would not have been thereby effected. It is not a requisite of taxability that the contemplation of death should have been the sole motive for the transfer.

Other state court decisions to the same effect are given in the margin.¹⁴

Beyond peradventure, therefore, both the decisions of the Second Circuit in the *Astor* case (*Farmers' Loan*

¹⁴ *Estate of Boole*, 98 Cal. App. 714, 722; *Sellinger's Adm'r v. Reeves*, 1942, 292 Ky. 114, 119; 166 S. W. 54, 57.

& *Trust Co. v. Bowers, supra*, (68 F. 2d 916, certiorari denied, 293 U.S. 565, 296 U.S. 649), 299 U.S. 582, and *Farmers' Loan & Trust Co. v. Bowers*, 98 F. 2d 794, certiorari denied, 306 U.S. 648, 307 U.S. 651, 308 U.S. 634; 310 U.S. 657), holding that a substantially contributing death purpose brings a transfer within the statute (in that case a purpose to avoid the tax), rest upon a firm foundation.

In connection with its contention that the gift was not made in contemplation of death, the taxpayer asserts (Br. 53), and repeats the assertion (Br. 59) in connection with its contention that the contract was not so made, that in the case of *Allen v. Trust Co. of Georgia, supra*, the Supreme Court repudiated the test that a motive associated with death, such as the avoidance of estate taxes, need only be substantial in order to sweep a transfer or release motivated thereby into the gross estate, as groundless. But such assertion obviously rests upon a misinterpretation of the Supreme Court's holding in that case. The decedent therein had, many years prior to his death, set up certain trusts for his improvident children in order to insure an adequate livelihood to each. He had, however, reserved a power to amend the trusts in conjunction with the beneficiaries and the trustee in the belief that, under the law as it then existed, such reservation would not attract the federal death tax. The decedent's purpose was to set up spendthrift trusts which could not be reached by creditors and would be free from all taxes, both state and federal. He released the power only when and immediately that he was advised of a then fairly recent decision of the Supreme Court that its retention would sweep the trust estates into his gross estate at his death. It was conceded that the original transfers in trust were not made by the decedent in contemplation of his death; and, as the Supreme Court

pointed out in its opinion (p. 937)—a fact to which we have already adverted—the concurrent findings of both lower courts, which it was not at liberty to disturb, were that the establishment of the trusts in 1925, their enlargement in 1934, and the release of the power in 1937, constituted one integrated transaction. On these facts the Court concluded that the decedent's desire to avoid death taxes by the release did no more than establish that he did not want his plan to underwrite the needs of his children and grandchildren jeopardized.

While the Supreme Court assertedly granted certiorari in that case because of an alleged conflict between the decision of the Fifth Circuit therein and those of the Second Circuit in the *Astor* case, it did not resolve such alleged conflict for the obvious reason that it regarded the case before it distinguishable from the *Astor* case.

The fact of the matter is that the decisions of the Second Circuit in the *Astor* case have never been successfully assailed, but to the contrary have assumed an ever wider importance in this field of the law. The only case in which an attempt was made to assail them is *Denniston v. Commissioner*, 106 F. 2d 625 (C.C.A. 3d), cited by the Supreme Court in fn. 2, p. 33 of its opinion in the *Allen v. Trust Co. of Georgia* case, wherein the *Astor* decisions are likewise cited. But the *Denniston* case (p. 33, fn. 2), must be regarded as having in effect been overruled by the Third Circuit in virtue of its *per curiam* affirmance of the case of *Commonwealth Trust Co. of Pittsburgh v. Driscoll*, *supra* (137 F. 2d 653, rehearing denied September 20, 1943), the opinion of the District Court of the United States for the Northern District of Pennsylvania being reported in 50 F. Supp. 949. It is to be noted that the District Court had rested its decision, that the transfer there in question was made in contemplation

of death, on the proposition that a purpose to avoid the tax was alone sufficient to sweep a transfer so motivated into the decedent's gross estate. Although the taxpayer in that case strenuously urged upon the Circuit Court of Appeals that the District Court's decision was in conflict with its own prior decision in the *Denniston* case, the Third Circuit did not even so much as even mention it.

In any event, if the problem is viewed in the light of the broad purpose of the estate tax, namely, to levy a tax in respect of the passage of property from one generation to the next, little difficulty will be encountered in dealing with alleged life motives for transfers whose effect is to do just that. That the motive for a transfer may be judged by its effect cannot be disputed. As Randolph E. Paul states in his study on Motive and Intent in Federal Tax Law, *Selected Studies in Federal Taxation* (Second Series, 1938) 255, 273, "Effects are a fairly reliable pragmatic test of motive," citing the opinion of Mr. Chief Justice Hughes (who, of course, also wrote the decision in the *Wells* case), in *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U.S. 548, wherein he said (pp. 559-560):

Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough.

Beyond peradventure, therefore, the evidence in this case is amply sufficient to warrant the Tax Court's finding and should not be disturbed. As a matter of fact, we believe that, if this Court had sat as the trier of the fact, it could have reached no other conclusion.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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Attorney General.*

DECEMBER, 1948.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest*.—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death*.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * *

(e) [As amended by Sec. 402(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Joint and Community Interests*.—

(1) *Joint Interests*.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15. *Transfers during life*.—The following classes of transfers made by the decedent prior

to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (4) transfers under which the decedent retained the right, either alone or in conjunction with another person or persons, to designate who should possess or enjoy the property or the income therefrom (see section 81.19); and (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

The value of transferred property includible in the gross estate is the value thereof at the date of decedent's death, or if the executor has duly elected pursuant to the provisions of section 811(j) to have the value of the gross estate determined as of the dates therein prescribed, then the value will be that as of the applicable date or dates so prescribed (see section 81.11). If a portion only of the property was so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate.

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SEC. 81.16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that

general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary deemed to have been made in contemplation of death.

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SEC. 81.22. *Property held jointly or by the entirety.*—The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right

of survivorship and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

No. 12027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF FRANK K. SULLIVAN, Deceased, by FLOYD K.
SULLIVAN, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER.

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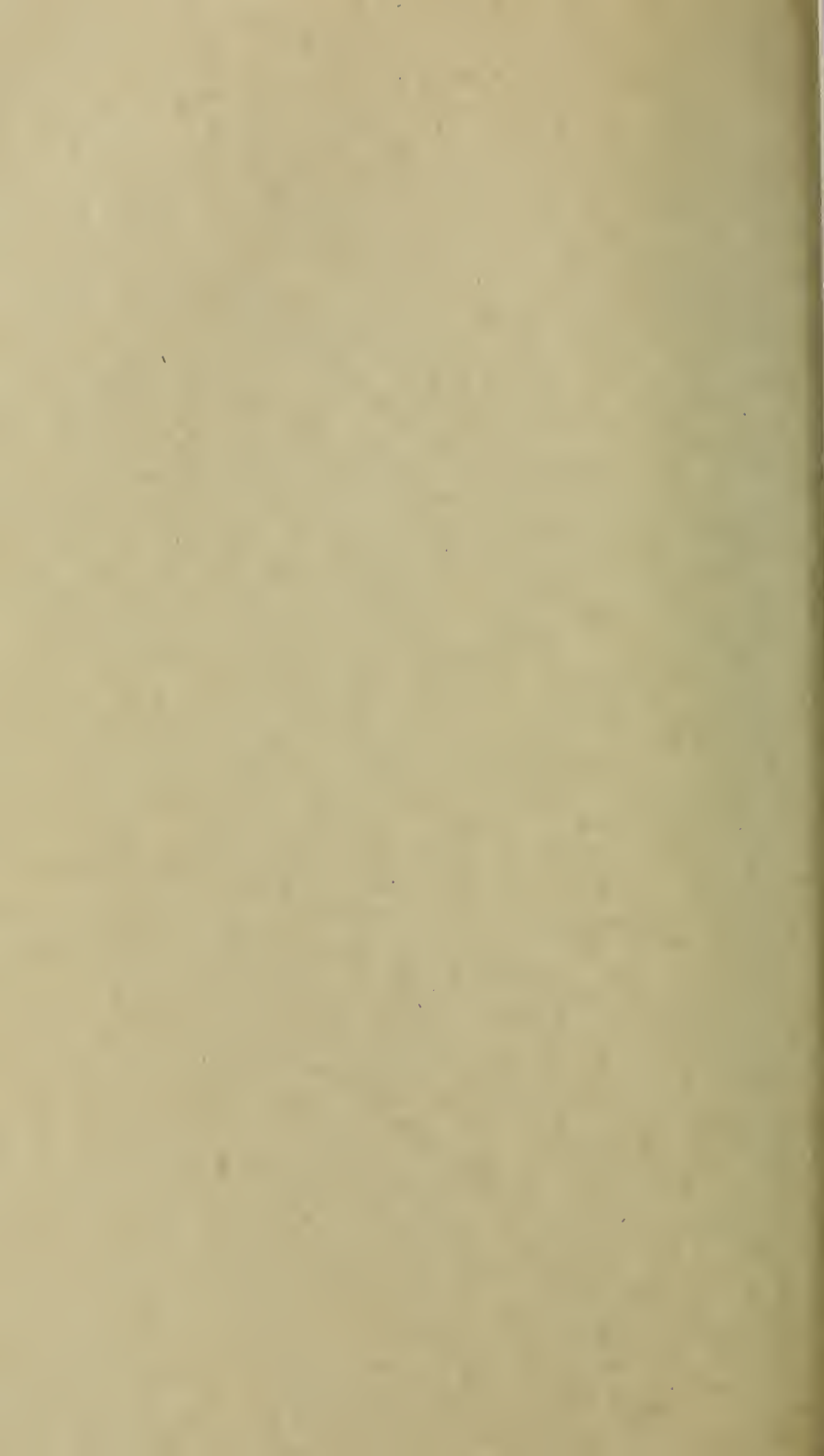
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FILED

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PAUL P. O'BRIEN,

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REPLY BRIEF OF PETITIONER.

Preliminary Statement.

Most of the points raised and arguments made by respondent in his brief were anticipated and adequately discussed and answered in the Brief of Petitioner and Brief of *Amici Curiae* heretofore filed in the above-entitled Court in this cause, and we shall attempt to avoid repetition herein of matters set forth in the two briefs last mentioned.

Petitioner approves and adopts, as a supplement to his briefs, the Brief of *Amici Curiae*, which was filed after petitioner's first brief was filed herein.

Reference in both of petitioner's briefs to portions of the Transcript of Record are expressed by the abbreviation "Tr." References herein to the briefs heretofore filed by petitioner and the *amici curiae* are expressed by the abbreviations "Pet. Br." and "A. C. Br." respectively.

Respondent's Statement of Questions Presented.

Comment upon respondent's statement of Questions Presented appears desirable to clarify and possibly to simplify the issues involved in the cause under review.

In the brief heretofore filed by petitioner in this Court it was contended, among other things, that the securities aggregating \$12,340.63 in value, standing in the name of decedent alone at the time of the gifts to Floyd K. Sullivan, decedent's son, were then owned by decedent and his wife as joint tenants, that only an undivided one-half interest in the donated securities was transferred by decedent, and that the value of the property interests transferred by decedent to his son did not exceed \$16,763.27, or in any event did not exceed \$22,933.59. Petitioner complained of the findings of fact and conclusions of law (*i. e.*, "holdings") and decision of the Tax Court to the extent that they were inconsistent or in conflict with or failed to support these contentions, and error was assigned accordingly. (Pet. Br. pp. 9-10, 17-18, 21-24, 27-29, 41-50, esp. pars. (2)-(6), (9), (10), (13), (35) and (36) of Specification of Errors, Pet. Br. pp. 22-27.)

No reference to any of these contentions is made in respondent's Statement of Questions Presented. (Resp. Br. pp. 2-3.) However, respondent concedes in his brief that all of the property given by decedent and his wife to their son was owned and held by the donors as joint tenants at and immediately prior to the time the gifts were made, and respondent construes the findings of fact made by the Tax Court as so declaring in substance and effect. (Resp. Br. pp. 14-15.) Although petitioner does not agree with this construction of the findings, he believes it is in accord with the true facts and does not object to having

the case decided on the basis thereof. If the findings are so construed, we submit that all of the donated securities were owned by decedent and his wife as joint tenants at the time the gifts to the son were made; that, for reasons set forth in our earlier brief, decedent could not have transferred more than an undivided one-half interest in such securities to his son in contemplation of death or otherwise; and that no part of the value of such securities in excess of \$16,763.27 (one-half of the total value of the securities) was includible in his gross estate under I. R. C. Section 811(c) even if such one-half interest had been transferred in contemplation of his death. (Pet. Br. pp. 29, 41-50. See also, A. C. Br. pp. 6-13.)

In the brief heretofore filed by petitioner in this Court it was also contended, among other things, that the parcel of real property of the value of \$1,500 standing in the name of decedent alone at and immediately prior to the execution of the agreement of November 24, 1943, was then owned by decedent and his wife as joint tenants, and petitioner complained of the failure of the Tax Court to find so specifically, and assigned such failure as error. (Pet. Br. pp. 16, 19, 31, 32, 56-60, esp. pars. (15), (16) of Specification of Errors, Pet. Br. p. 24.) Had the Tax Court made such a finding of fact, the findings would have supported petitioner's contention that all of the properties affected by the agreement of November 24, 1943, were owned and held by decedent and his wife as joint tenants at and immediately prior to the execution of the agreement, and under petitioner's view of the case—and that of the *amici curiae*—no part in excess of one-half of the value of such properties was includible in decedent's gross estate (the includible portion being the value

of decedent's undivided one-half interest as a tenant in common with his wife). Petitioner contended further that if the parcel of real property standing in decedent's name alone when the agreement was executed was not then owned by him and his wife as joint tenants, but was then solely owned by him, the only interest he transferred to his wife was an undivided one-half interest (valued at \$750) in said parcel of land; or, if any transfer was involved in the conversion of the joint-tenancy properties into tenancy-in-common properties, the amount by which the fair market value of the property transferred by decedent to his wife exceeded the value of the consideration therefor was not in excess of \$750 (one-half of the value of the solely-owned parcel). Petitioner complained of the findings of fact and conclusions of law and decision of the Tax Court to the extent that they were inconsistent or in conflict with or failed to support these contentions, and error was assigned accordingly. (Pet. Br. pp. 16, 19, 24-25, 32, 58-59, esp. par. 19 of Specifications of Errors, Pet. Br. pp. 24-25.)

The significance of these contentions is apparent when the language of respondent's regulations is considered. Reg. 105, Sec. 81.15, which applies to transfers in contemplation of death under I. R. C. 811(c), provides in part as follows:

“If a portion only of the property were so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate.

* * * * *

“If the price was less than such a consideration, *only the excess of the fair market value of the property* (as of the date of decedent’s death, or as of the applicable date under such an election as is mentioned in the last preceding paragraph) *over the price received by the decedent should be included in ascertaining the value of the gross estate.*” (Italics ours.)

In his Statement of Questions Presented respondent ignores the deficiencies in the findings, conclusions and decision of the Tax Court in connection with the \$1,500 parcel. The only reference respondent makes in his brief to said parcel is found in his statement of facts, where he erroneously refers to the parcel as one of a value of \$750 and says it “was held by the decedent alone.” (Resp. Br. p. 4 Cf. [Tr. p. 29, par. 4(b).])

Respondent also ignores in his Statement of Questions Presented the question whether the holding that the value of the properties, exclusive of those given to decedent’s son, was includible in decedent’s gross estate under I. R. C. Section 811(e)(1), was unsupported by the findings of fact, and the question whether respondent was and is estopped and precluded by the provisions of and omissions from his notice of deficiency from assessing any deficiency based upon his inclusion in the value of the decedent’s gross estate under I. R. C. Section 811(e) of the value of any of the properties involved exclusive of the United States Savings Bonds. (See Pet. Br. pp. 9, 15-16, 20, 21, pars. (8), (15); pp. 26-27, pars. (26), (34); pp. 32-34, pars. III. E 1., III. F. 3., and IV; pp. 56, 64, 67-73, 74.)

Respondent's failure to recognize these questions relating to I. R. C. Section 811(e)(1) is undoubtedly explained by the fact that even respondent cannot accept as sound reasoning the legerdemain by which the Tax Court reached its conclusions in this case. We acknowledge that correct analysis of the Tax Court's opinion and holdings in this case is difficult, but we submit that what the Court actually did, contrary to all precedent and authority, was to give I. R. C. Section 811(c) the effect of a transaction-avoiding law, and then to apply I. R. C. Section 811(e)(1) retroactively, both to the transaction involving the gifts to decedent's son and to the transaction whereby the joint-tenancy properties were converted into tenancy-in-common properties. (See Pet. Br. pp. 56; 68-69.) The references made by the Court to Section 811(e)(1), the emphasis placed upon the original source of the property, the suggestion that petitioner was charged with the burden of proving that decedent did not supply all of the property and the consideration therefor, the assertion that the "transfers" did not "serve to make the situation any different from what it would have been if the decedent had died immediately before making the gift to his son and executing the agreement of November 24, 1943, with his wife," and other assertions made in the opinion of the Tax Court show clearly that the Court was invoking Section 811(c)(1) as the taxing section. [Tr. pp. 112-114.] Contribution is material to an application of that section, but has nothing to do with Section 811(c).

The fact that respondent does believe that I. R. C. Section 811(e)(1) may not properly be invoked in support of the asserted deficiency clearly appears from the following two passages from his brief:

On pages 9-10 of his brief he says:

“The Tax Court included the value of the property here in question in the decedent’s gross estate under Section 811(c) of the Internal Revenue Code on the basis of its finding that the decedent had made the transfers of his interest therein in contemplation of his death within the meaning of that section. *It did not include it under Section 811(e) as jointly held property*, as the taxpayer (as well as the friends of the Court) contends.” (Italics ours.)

After referring to petitioner’s “misconception of the Tax Court’s findings and the basis of its decision” (Resp. Br. p. 15), respondent says, at page 16 of his brief:

“The taxpayer’s contention in this regard is, however, without basis in point of fact. To the contrary, the express finding of the Tax Court is that both the gift and agreement were made in contemplation of the decedent’s death and, in this connection, that the agreement was not a *bona fide* sale for adequate and full consideration in money or money’s worth. [R. 101.] Obviously, that finding is one which is solely designed to bring both the gift and the contract within the contemplation of death provisions of Section 811(c). By contrast, *there is no finding either circumstantial or otherwise which would justify the inclusion of the value of the property in the decedent’s*

gross estate under Section 811(e)(1), so that on its face the taxpayer's contention does violence to the Tax Court's findings and its decision which is based thereon." (Emphasis ours.)

It is clear from this statement that respondent agrees with petitioner that the asserted deficiency in this case may not be supported in whole or in part by the inclusion of the value of any property in decedent's gross estate under I. R. C. Section 811(e)(1). Since both parties are in agreement on this proposition, it appears that Section 811(e)(1) has ceased to be material to the case.

Also omitted from respondent's Statement of Questions Presented is the question whether the Tax Court erred in failing to make in its "Findings of Fact" a finding upon the issue whether, at the date of decedent's death, all of the property owned or held by him and his wife and each of them was owned by them as tenants in common in equal undivided shares and interests. (See Pet. Br. pp. 14-15, 19, 25, 60.) However, the Court in its opinion found and held that at the time of decedent's death his only interest in such property was that of a tenant in common. [Tr. pp. 91-101, 109.] Both parties agree that this holding is correct.

Other questions involved (*e. g.*, burden of proof) are ignored by petitioner in his Statement of Questions Presented, but we do not believe respondent disputes the position of petitioner with reference thereto, so we shall not discuss them herein.

Respondent's Statement of Case.

A number of inaccurate and incorrect assertions are made in respondent's Statement of the Case appearing on pages 3 to 9, both inclusive, of his brief. Some of these assertions require comment.

1. On page 4 of respondent's brief the following statement appears:

"With respect to the tenure of his property, it was stipulated [par. 14, R. 35] and specifically found by the Tax Court [R. 99] that, prior to November 24, 1943, when the decedent and his wife *confirmed a previous gift* of property of the value of \$33,526.54 to their son and made an agreement converting the balance of their property from joint into common property, . . . [Etc.]" (Italics ours.)

In fact the Tax Court made no finding and there was no evidence that decedent and his wife confirmed any gift to their son on November 24, 1943, when the conversion agreement was made. The evidence clearly showed that the gifts to the son and the conversion of the joint-tenancy properties into tenancy-in-common properties were separate and distinct transactions. At the time decedent and his wife formulated their intention to make the gifts to their son they had no thought of converting any of their joint-tenancy properties into tenancies in common. They initially consulted Mr. Triplett about gifts to their son and nothing else, and those gifts would have been made had nothing ever been said or done about the joint-tenancy conversion. The conversion was made solely as the result of suggestions made by Mr. Triplett and he made them gratuitously; that is, his advice was not sought about that subject until after he had first mentioned it to Mr. and Mrs. Sullivan. [Tr. 173-175, 180-181.]

2. On page 4 of respondent's brief reference is made to the parcel of real estate which stood in the name of the decedent alone at the time the agreement of November 24, 1943, was executed. Respondent recites that said parcel was of a value of \$750. In fact the value of the parcel was \$1,500, one-half of which was included in the value of decedent's gross estate by the executor and one-half of which was added to the value of said estate by respondent in his Notice of Deficiency. [Tr. 28-29, esp. par. 4(b), p. 29.]

3. On page 5 of respondent's brief the following statement is made:

"The decedent's loss therein was about \$12,000."

According to the evidence and the findings the loss referred to was that of Floyd K. Sullivan, not the decedent. [Tr. 165, 93.]

4. On page 5 of respondent's brief the statement is made that in "1943 the decedent and his wife informed their son of their desire to make a gift to him, in order, as they then told him, to enable him to make payments on the mortgage on his house and to make it easier for him to meet his obligations." In footnote 2 on said page respondent asserts that the "son testified that this was in the middle of September, 1943." Respondent further asserts that "shortly thereafter on September 27, 1943," decedent and his wife "informed Triplett that the gift was intended to augment their son's income." (Resp. Br. p. 6.)

It is not true that the son testified that, in the *middle* of 1943, decedent and his wife informed him of their desire to make a gift, and there was no evidence and no finding that the information was given to Triplett *shortly* after the son was informed of his parents' desire to make

a gift to him. The son's testimony in this connection was as follows:

"Q. In 1943, did your mother and father speak to you about making a gift to you? A. Yes." [Tr. 126.]

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"Q. If you recall, about what time was that meeting with Mr. Triplett? A. Well, it was about the middle of September, 1943." [Tr. 127.]

So far as the evidence discloses, the son may have been informed of his parents' desire to make a gift to him long before the middle of September, 1943, and it is possible that, when they met with Mr. Triplett, they had reasons additional to those originally existing, for making the gifts to their son.

5. In footnote 3 on page 5 of respondent's brief he says:

"However, the lawyer Triplett testified that when he told the decedent and his wife at their first conference, held on September 27, 1943, that they could make a gift of \$33,000 which would be free from the federal gift tax if they had made no prior gifts, the decedent's wife said that they, referring to herself and the decedent, did not have in mind giving him that much; what they wanted to give him was 'something that would give him some additional income.' [R. 175.] However, she later stated to Triplett that they had in mind giving their son 'about half of what I suggested they could give him.' [R. 175.]"

In footnote 4 on page 6 of respondent's brief he says:

"We think it is obvious the decedent and his wife increased the amount of the gift which they had

originally intended to make to the son, as testified to by the witness Triplett, to the amount stated because of his advice that a tax free gift in the amount of \$33,000 could be made by them. [R. 174.]”

The inaccuracy of respondent’s statements above quoted is shown from the following excerpts from Mr. Triplett’s testimony:

“I told them what the exclusions and exemptions were. They could *each* give their son—I think I said \$33,000.00, that year, providing they hadn’t made any previous gifts.

“I asked them if they had made any previous gifts to anyone. They said no, except Christmas and charitable, small gifts. I told them they could give their son *each* \$33,000.00 without there being any federal gift tax.

“Mrs. Sullivan said, ‘Well, we didn’t have in mind giving him that much.’ She said, ‘What we wanted to give him, what we want to give him is something that will give him some additional income.’” (Italics ours.) [Tr. 174.]

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“But that *they* had in mind only giving him *about* one-half of what I suggested *they* could give him.” (Italics ours.) [Tr. 175.]

In other words, according to the evidence, Mr. Triplett advised the decedent and his wife that they could make gifts aggregating \$66,000 to their son without incurring any gift tax, provided they had made no previous gifts. The gifts which they finally made were gifts of property of an aggregate value of \$33,526.54, which was “about” one-half of the value of the tax free gifts which they

might have made according to the advice given to them by Mr. Triplett. Of this matter the Tax Court said in its Findings of Fact:

“They informed the attorney that all of their property was owned as joint tenants and that they had in mind a gift of about \$33,000 to augment their son’s income.” [Tr. 93.]

6. At page 7 of respondent’s brief the following statement is made:

“Triplett expressed the opinion that the transaction would be a non-taxable exchange and that thereafter one-half of the property would be in the wife’s estate, so that the ultimate tax savings would not be very much, and that such transfer would involve additional probate expenses.”

Both the Tax Court [Tr. 95] and respondent misinterpret the testimony of Mr. Triplett in this connection. Mr. Triplett was not talking about tax *savings* at the time he gave the opinion to which respondent refers. In substance and effect he was pointing out that if the joint-tenancy properties were converted into tenancy-in-common properties and Mrs. Sullivan should predecease her husband, the estate taxes would be *increased* somewhat. And he said nothing about a “transfer.” His testimony was as follows:

“I told them I didn’t think there would be any gift tax involved. I thought it was an exchange. And I told them that he was taking some chance, however, if his wife should die first, and that after they reached such a division half of it would be in her estate. Not that the amount was so large it made much difference

in tax consequences, but it would make some additional probate expense. I explained that to them.” [Tr. 181.]

7. At page 8 of respondent’s brief in referring to a chronology of events it is said that on “November 26, 1943, a letter was written by the First California Company . . .” This is identified as Exhibit 2-B. It should be noted that the mentioned letter was written November 26, 1947 (not 1943), a few days prior to the hearing before the Tax Court, and long after the transactions here concerned with occurred.

8. At page 10 of respondent’s brief it is said that the case was reviewed by the entire Tax Court.

The opinion contains the following statement:

“Reviewed by the Court.” [Tr. 114.]

We do not understand that this necessarily means that each and every member of the Court reviewed the case or the opinion. We do not know the facts in connection with the review of the present case. However, we think it significant that three judges of the Tax Court dissented in the case of *Estate of Edwin W. Rickenberg, Deceased*, 11 T. C., No. 1, C. C. H. Dec. 16, 483, decided July 7, 1948, in which the Court held that the entire value of California community property converted into tenancies in common by agreement of the spouses was includible in the value of the estate of the husband, who predeceased his wife. In that case, the case now under review was cited and relied upon in the opinion of the Court which was prepared by Judge Disney, the same judge who wrote the opinion in the present case.

Respondent's Argument and Summary Thereof.

We have already commented sufficiently upon the statement made by respondent in his Summary of Argument that the Tax Court did not include the value of the property here in question in decedent's gross estate under Section 811(e) as jointly held property, and to the statement made in respondent's argument that there is no finding which would justify the inclusion of the value of the property in decedent's gross estate under Section 811(e)(1). (Resp. Br. pp. 10, 15.)

In respondent's Summary of Argument he says, among other things, in substance, that the brief of the *amici curiae* in effect concedes that the "transfers" were made by decedent in contemplation of his death. (Resp. Br. p. 10.) Respondent also says that the *amici curiae* do not discuss this question "because, in their view, it lacks importance." (Resp. Br. p. 20.) He also says that "the fact they do not attempt to support the taxpayer's contention that the gift and contract were not made by the decedent in contemplation of his death is adequately to be explained only on the ground that they regard such contention as insupportable." (Resp. Br. p. 21.) These assertions grossly distort the language of, or ignore, the following paragraph set forth on page 2 of the brief of the *amici curiae*:

"We do not propose to take any position with respect to the first holding, i. e., contemplation of death. Since it is dependent on the particular facts as to decedent's state of mind, as well as the two-year statutory presumption, we do not consider this holding important *to our clients* or to taxpayers generally. We shall therefore *assume in this brief* that the Tax Court was correct in such holding, *although*

we do not thereby intend to express any views of our own on this subject. If this Court shall hold that the transfer was not in contemplation of death that is an end of the case." (Italics ours.)

Before leaving this quotation, we call attention to another reckless and inaccurate statement made by respondent concerning the brief of *amici curiae*. At page 20 of respondent's brief he says that: "These friends of the Court professedly *represent no clients directly interested* in the questions presented in this case, but only taxpayers generally who may be similarly situated and among whom some of their present and future clients may appear." (Italics ours.) The impropriety of this statement clearly appears not only from the quotation from the brief of *amici curiae* last hereinabove set forth, but from the following statement appearing on page 1 of the brief of *amici curiae*: "We do not act on behalf of any specific clients, but believe that certain legal issues are of importance to *various taxpayers whom we represent* as well as to taxpayers generally." (Italics ours.)

Respondent first argues that the "bundle of rights" which the decedent had in the property which he jointly owned with his wife is an interest in property within the meaning of I. R. C. Section 811(c); that such interest extended to the whole property; that the right of survivorship is an interest in the joint-tenancy property and that by the gifts to decedent's son and by the agreement of November 24, 1943, decedent made transfers of such interest including his right of survivorship. (Resp. Br. pp. 10-12; 22-34.)

That decedent's right of survivorship is not an interest in property within the meaning of I. R. C. Section 811(c), is, we think, adequately shown by the *amici curiae*

at pages 44 to 49, both inclusive, of their brief, which petitioner approves and adopts. Some comment should, however, be made herein about some of respondent's assertions upon this subject.

At page 11 of his brief respondent says, in substance, that decedent *transferred* his right of survivorship in the properties given to his son and in the joint-tenancy properties affected by the agreement of November 24, 1943. Similar assertions are made on pages 23 and 24 of his brief. The absurdity of this claim is obvious. If any right of survivorship possessed by decedent was transferred, who received it? Certainly the son received no such right; neither did decedent's wife. Decedent's right of survivorship as a joint tenant of the donated securities was extinguished when the gifts and transfers to his son were made, and his right of survivorship with reference to the remainder of the jointly held properties was extinguished when the agreement of November 24, 1943, was executed. Respondent recognizes the right of survivorship as an important incident of a joint tenancy (Resp. Br. p. 18), and he repeatedly recognizes that the conversion of the joint tenancies by agreement effected a complete destruction of the joint tenancies and every right, title and interest which each tenant had therein and substituted a wholly new and different tenancy therefor. (Resp. Br. pp. 25, 26, 28.)

At pages 11 and 12 of his brief respondent says: "But, as stated, we are not dealing here alone with the relinquishment of the right of survivorship. We are dealing with dispositions by the decedent of his interest in jointly held property, and such dispositions are 'transfers' within the meaning of Section 811(c)." It is a sufficient answer to this contention to point out that decedent, as one of two joint tenants, had no legal *power* to transfer

more than an undivided one-half interest in the jointly held properties. This proposition is elementary and requires no citation of authority to support it.

At page 23 of his brief respondent correctly says that petitioner contends decedent and his wife each made a gift to their son of an undivided one-half interest in the donated property, but respondent incorrectly adds, in substance, that petitioner says each spouse owned an undivided one-half interest in the property. Petitioner merely said that the interests of decedent and his wife in the securities held in joint tenancy were *equal*, undivided interests. (Pet. Br. pp. 45, 43.) This statement of petitioner is correct whether each of two joint tenants has a single undivided title to the property or merely an undivided one-half interest therein. However, the California courts have held that each of two joint tenants has an undivided one-half interest in the property. (See cases cited, A. C. Br. pp. 6-11. See also C. C. Sec. 683, Pet. Br. p. 42.) And it is immaterial here whether the unity of title or undivided fractional interest view is accepted as correct because, as before stated herein, neither of the two joint tenants had the *power* to transfer more than an undivided one-half interest in the jointly held properties. In this connection attention is called to the following significant language found on pages 18 and 19 of respondent's brief:

"A word should be said with regard to the taxpayer's contention that the *state law is controlling here. Of course it is*, but only to the extent that it determines the character of the interest which each joint tenant has in joint property, *including the extent of the power he has over its disposition.*

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“To sum up: The importance of the local law of property lies only in the fact that it is determinative of the right, title and interest of its owners therein, both before and after its disposition, including the time *and manner in which such right, title and interest may be disposed of.*” (Italics ours.)

We concede that I. R. C. Section 811(c) may, in certain cases, render a transfer of the undivided one-half interest of one of two joint tenants subject to estate taxes, but we deny that this is such a case. Here the requisite motive was lacking in each of the transactions involved; and there was no transfer involved in the conversion of the joint-tenancy properties into tenancy-in-common properties—in any event, there was no transfer for less than an adequate and full consideration in money's worth.

At page 24 of respondent's brief he appears to attach significance to the fact that no part of the property was shown originally to have belonged to decedent's wife or to have originated entirely with her. Respondent says that this (coupled with the existence of the right of survivorship) “brings the property in the first instance within the purview of another subsection of the statute, namely, Section 811(e).” (Resp. Br. p. 24.) But, as we have already observed, contribution has nothing to do with Section 811(c) and respondent has conceded that nothing can be taxable in this case under Section 811(e) (1)—a section under which contribution is material. (Resp. Br. pp. 10, 15.)

In footnote 8, appearing on page 25 of respondent's brief, respondent declares, in substance, that the contention of petitioner and the *amici curiae* that the agreement of November 24, 1943, was a sale for an adequate

and full consideration in money's worth is inconsistent with the contention of petitioner and the *amici curiae* that the agreement involved merely a release of the right of survivorship and no transfer of an interest in the property. These contentions are, of course, inconsistent. However, as respondent well knows, the contentions are made as alternatives, either of which, if sustained, suffice to remove the transaction from I. R. C. Section 811(c). The inconsistency has no significance.

At page 26 of respondent's brief it is said that the conversation of the joint-tenancy property into tenancy-in-common property destroyed "the old tenancy completely, and with it every right, title and interest which each tenant had therein, and substituted a wholly different tenancy therefor." Similar statements appear on pages 25 and 28 of respondent's brief. Respondent might well have added that with the destruction of the old tenancy the new tenancy—a tenancy in common—was created *by operation of law* and not by virtue of any transfer *inter vivos* by or to either of the tenants. It may also be observed that the destruction of the joint tenancy occurred during the lifetime of both tenants, making I. R. C. Section 811(e)(1) entirely inapplicable to the case. (See Pet. Br. p. 58.)

Throughout respondent's brief it is said that the contract (the agreement of November 24, 1943) involved a transfer of an interest in the property within the meaning of Section 811(c). Although petitioner denies that any transfer was involved in said contract, we repeat what was said in petitioner's brief herein that the decedent *could not* have transferred more, but may have transferred less to his wife than he received from her with reference to the joint-tenancy properties for the reason

that, due to her greater life expectancy, her right of survivorship was worth more than his.

The proposition that the interest of a joint tenant who has the greater expectancy of life is worth more than the interest of another joint tenant finds recognition and support in a letter to the First National Bank of Oregon, dated October 1, 1948, from D. S. Bliss, Acting Deputy Commissioner, reported at Par. 6028, CCH "Federal Estate and Gift Tax Reports." The opinion of Mr. Bliss was to the effect that the conversion of a tenancy by the entirety (in Oregon real property) into a tenancy in common is not a taxable gift if the spouses are of the same age, but if their ages differ, the transfer is taxable as a gift from the younger to the older to the extent of the value of the rights of the younger under the tenancy by the entirety less one-half the value of the property. With the conservatism for which the Commissioner of Internal Revenue is noted (where a candid statement might be deemed a recognition of taxpayer's rights) Mr. Bliss says:

"It will be noted that this has no relation to the treatment of similar tenancies for estate tax purposes. This is due to the fact that the estate tax law and regulations relative to jointly owned property differ substantially from the gift tax law and regulations."

He adds:

"It is assumed that the case of *Sullivan v. Commissioner* to which you refer is the case by that name recently decided by the Tax Court of the United States and reported at 10 T. C. 961. That case involved a joint tenancy in the State of California which differs from a tenancy by the entirety in the

State of Oregon in that either tenant may sever his interest at any time without the consent of the other. Under the circumstances it is believed that that decision has no bearing on the question."

A comment on the ruling is found in "The Tax Barometer" issue of December 24, 1948, paragraph 55, where the following statement is made:

"The ruling does not mention joint tenancies which may be severed by either party without the consent of the other. It would seem, however, that when there is such unilateral right of severance there is no gift tax on conversion of the tenancy into a tenancy in common."

Another comment on the ruling is found in "Estate and Tax News" (prepared by Prentice-Hall, Inc. for Title Insurance and Trust Company, Los Angeles), issue of January, 1949, wherein it is said:

"Presumably, conversion of a joint tenancy into an equal tenancy in common would involve no gift tax."

However much Mr. Bliss may hedge in his ruling, excluding from it estate tax situations, and despite his insistence that the *Sullivan* case has no bearing on the question which he is discussing, there can be no doubt in logic or common sense that the principle he announces has application in estate tax cases and to joint tenancy situations just as it does in gift tax cases involving tenancies by the entirety; and there can be no doubt in law either. The gift tax and estate tax laws are to be construed in *pari materia*, as has often been held by the Courts. See for example, the case of *Merrill v. Fahs* (1945), 324 U. S. 308, 89 L. Ed. 963, upon which respondent places much reliance at pages 35-36 of his brief.

We submit, therefore, that, in the conversion of the joint tenancies into tenancies in common, Mrs. Sullivan parted with more than decedent did, and if there were transfers from one spouse to the other, decedent received more value—more “money’s worth”—than he gave.

In support of his contention that the contract involved a transfer of an interest in the property within the meaning of Section 811(c), respondent invokes the rule of construction that a statute is to be so construed as to carry its purpose into effect. Respondent adds:

“Particularly is this true with regard to statutory provisions which are enacted to prevent tax evasion. These must be fairly construed in order to effectuate their purpose.” (Resp. Br. 28.)

It is perhaps sufficient to say in answer to these propositions that it is for Congress to determine the purposes of federal legislation, whether relating to revenue or otherwise, and to prescribe the applicable laws. Congress has not given the Commissioner of Internal Revenue *carte blanche* to construe the statutes. However, something else may be said in answer to respondent’s propositions in this connection. It is an elementary and well-settled rule of law that taxing statutes are to be construed strictly in favor of the taxpayer and are not to be extended by implication beyond the clear import of the language used; and in cases of doubt or ambiguity every intendment is to be taken against the taxing powers.

In the estate-tax case of *Crooks v. Harrelson* (1930), 282 U. S. 55, 61, 75 L. Ed. 156, 176, the Court says:

“Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the

letter applies with peculiar strictness. In *United States v. Merriam*, 263 U. S. 179, 187, 188, 68 L. Ed. 240, 244, 29 A. L. R. 1547, 44 S. Ct. 69, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in *Partington v. Atty. Gen.* L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' "

See also:

Porter v. Commissioner (1933), 288 U. S. 436, 442, 77 L. Ed. 880, 884;

Bowers v. N. Y. & Albany Lighterage Co. (1927), 273 U. S. 346, 350, 71 L. Ed. 676, 679;

Hecht v. Malley (1924), 265 U. S. 144, 156, 68 L. Ed. 949, 957;

Gould v. Gould (1917), 245 U. S. 151, 153, 62 L. Ed. 211, 213;

Corporation of America v. McLaughlin (1938—C. C. A. 9), 100 F. 2d 72, 77.

The remainder of the contentions of respondent that the "bundle of rights" possessed by decedent in the jointly held property is an "interest" of which the decedent made a "transfer" within the meaning of Section 811(c) of

the Internal Revenue Code are, we think, sufficiently answered by the briefs heretofore filed in this Court by petitioner and the *amici curiae*. (A. C. Br. pp. 44-47, 30-40; Pet. Br. pp. 28, 31-33, 57-58, 62-64.)

The second major point made by respondent in this argument is that the agreement of November 24, 1943, was not a sale for an adequate and full consideration in money or money's worth within the meaning of I. R. C. Section 811(c). (Resp. Br. p. 12; pp. 34-36.)

In his Summary of Argument respondent says, in substance, that the contract was not a sale for an adequate and full consideration in money or money's worth within the meaning of Section 811(c) because each joint tenant could have dissolved the tenancy by unilateral action even without the knowledge or consent of the other and could have relinquished his interest therein to the other without consideration. (Resp. Br. p. 12.) A similar statement appears on pages 34-35 of respondent's brief. This is a clear *non sequitur*. It does not follow that because a joint tenant may dispose of his or her interest without consideration that there may not be a consideration therefor. In the case now on review, we submit that if any transfer was involved in the conversion of the joint-tenancy properties into tenancy-in-common properties, it amounted to a sale for an adequate and full consideration in money's worth within the meaning of I. R. C. Section 811(c). (See Pet. Br. pp. 31, 32-34, 63-67; A. C. Br. pp. 13-29.)

On pages 35 and 36 respondent refers to and discusses the cases of *Merrill v. Fahs*, 324 U. S. 308; *Taft v. Bowers*, 304 U. S. 351, and *Giannini v. Commissioner*, 148 F. 2d 285, and respondent expresses astonishment

that the friends of the Court neither cited nor discussed these cases.

Merrill v. Fahs was not discussed by petitioner (and in all probability was not discussed by the *amici curiae*) because it dealt solely with the subject of the relinquishment of marital (dower) rights pursuant to an antenuptial settlement as a consideration in money or money's worth within the meaning of the gift tax laws. In this case, no marital rights are involved. The issues in this case would be exactly the same as they are at present had all of the jointly owned properties been owned and held by the decedent and his brother (or a stranger) instead of by the decedent and his wife. Furthermore, in the *Merrill* case the Court held that mere detriment to the donee (relinquishment of dower rights) was not a consideration in money or money's worth. In the present case, if decedent transferred any property interest to his wife, she necessarily transferred a like and equal property interest (possibly one of greater value than she received) to him, and he received a benefit at least commensurate with what he transferred.

Respondent's comment on the *Giannini* case is misleading. In that case no rule of law was announced that "the existence of a legal consideration under local law in the family arrangements was immaterial under tax laws." (See Resp. Br. p. 36.) The case was decided on its peculiar facts, and the facts were that the consideration given by the deceased was grossly disproportionate to that which he received and he had acknowledged in writing that what he had received was a *gift*. This case is not pertinent to anything here involved.

The case of *Taft v. Commissioner* (1938), 304 U. S. 351, 82 L. Ed. 1393 (referred to as *Taft v. Bowers* on page 36 of respondent's brief) has no bearing, even remote, upon any of the issues of law or fact involved in the case under review. In the *Taft* case the Court was concerned solely with the question whether certain estate tax deductions claimed could be supported as enforceable claims against the estate or as charitable gifts.

The third major point advocated by respondent is that the value of the whole property subject to the gift and contract is includible in decedent's gross estate. (Resp. Br. pp. 12-13, 36-44.) We think that sufficient has been said herein and in petitioner's brief heretofore filed and in the brief of *amici curiae*, to refute fully and satisfactorily respondent's contentions with reference to this point.

The final major proposition asserted by respondent is that the gift and contract were substitutes for testamentary dispositions and were made by decedent in contemplation of his death within the meaning of Section 811(c). (Resp. Br. pp. 13-14, 45-58.) Here again nothing need be added by way of reply to what was said in petitioner's earlier brief, in this brief and in the brief of the *amici curiae*. However, we shall comment briefly upon some of the assertions of respondent.

He says that the "transfers" were made in anticipation of decedent's death in fear or expectation that it might not be long delayed. (Resp. Br. p. 46.) But decedent made his gifts to his son for the sole purpose of giving the son financial assistance. And although the conversion of the joint tenancies was the result of suggestions of his attorney [Tr. 99], decedent refused to become a mere life beneficiary under his wife's will, as advised by the

attorney, notwithstanding that a probate proceeding might thereby have been avoided and *estate tax savings effected* by doing so. [Tr. 100, 191; Resp. Br. pp. 8-9.] Far from having thoughts of his imminent death, decedent was considering what would happen if his wife should predecease him; he wanted an absolute interest in her property, believing that "he could look after his own affairs." [Tr. 100, 191; Resp. Br. p. 9.]

At page 46 of his brief respondent says:

"On the other hand, the evidence beyond question sustains *the finding* that the gift, contract and will constituted an integrated transaction designed for the purpose of making a final disposition of all of the decedent's property and to do so in order to evade the federal tax, at least in part." (Italics ours.)

The Tax Court made no such finding.

Again at page 46 of his brief respondent departs from the record in fixing the time at which decedent and his wife first contemplated making a gift to their son, saying it was "as early as the first part of September, 1943." We have already pointed out herein that the son might have been *informed* of the contemplated gifts *any* time during 1943, prior to the middle of September, and when before that time his parents first *contemplated* making the gifts we do not know. It might even have been before 1943. On the same page respondent again misstates the record on the subject of Mr. Triplett's advice and the decision of Mr. and Mrs. Sullivan about the amount of the gifts. We have already commented sufficiently herein upon that subject.

Conclusion.

We again respectfully submit that the decision of the Tax Court should be reversed and that petitioner should be awarded his costs.

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No. 12028

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST H. BRIDGMAN and JAY C. HENSON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court for the
Southern District of California
Central Division

HON. JACOB WEINBERGER, JUDGE.

APPELLANT HENSON'S WRITTEN ARGUMENT.

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APPELLANT HENSON'S WRITTEN ARGUMENT.

May It Please the Court and Counsel for the Government:

Appellant Henson respectfully submits the following written arguments pursuant to leave granted in lieu of oral argument:

The indictment under which the defendants were prosecuted specifically charges that from August 14, 1945, and continuing to November 4, 1947, 27 named defendants devised and intended to devise a scheme and artifice to defraud purchasers and prospective purchasers of certain vending machines, and to obtain money and property by means of false and fraudulent schemes—well knowing at

the time that the pretenses, representations and promises would be false when made. The theory of the Government's case, set forth in the indictment, and the Government's statement of the case on page 3 of Appellee's Brief, charges the defendants with devising a single scheme, specifying 18 overt acts, in separate counts, and using the United States mails to defraud.

No person can be convicted of the offense of using the mails to defraud unless it be shown beyond a reasonable doubt that he knowingly devised a scheme to defraud and that the mails were used in furtherance of it. The offense is one requiring specific intent—without which the offense cannot be committed. Because of this, good faith of the accused is a complete defense.

United States v. Corlin, 44 Fed. Supp. 940, 947.

During the trial, and on page 14 of Appellee's Brief, the Government has repeatedly cited the *Blumenthal* case, which may be readily distinguished from the case at Bar in that in the *Blumenthal* case, there was a single conspiracy relative to illegal liquor transactions, and all of the defendants knew that it was illegal. In the case at Bar, the vending or automatic machine business is a respectable and accepted business in the United States. [See Defendants' Exhibit EE—United States Department of Commerce Bulletin on vending machines.]

Appellant Henson respectfully submits that the cases of *United States v. Kotteakos*, 328 U. S. 750, and *United States v. Corlin*, 44 Fed. Supp. 940, at 949, more accurately apply to this case, both as to the facts and the law, as appellant will point out.

To show the absence of the specific intent to defraud, and to show the good faith of the appellant Henson, and to further show the complete insufficiency of the evidence to prove a scheme, Appellant Henson respectfully points out the undisputed evidence relative to himself and the vending machine business.

Appellant Henson had no experience with vending machines [R. 5439], and answered an innocent advertisement in a Los Angeles paper placed by defendant, Earl H. Rhodes, inviting him to invest in machines himself [R. 5404]. In responding to said advertiseemnt, Appellant Henson met defendant Earl H. Rhodes for the first time [R. 5404, 5323, 5436]. At that time, approximately November, 1945 [R. 5436], Appellant Henson's status was that of a traveling salesman, selling a book entitled "Thunder God's Gold" [Exhibit N-4, R. 5393].

Appellant Henson saw defendant Earl H. Rhodes twice [R. 5404, 5407]. Henson personally investigated Rhodes by checking his references, to wit: Dunn and Bradstreet in Los Angeles, and the Security First National Bank in Los Angeles [R. 406, 415]. Both gave defendant Rhodes a good credit rating [R. 5405, 5406]. Appellant Henson went home and talked it over with his wife; the following day, to satisfy himself of the possibility of getting locations for vending machines, Henson went out with a locator of defendant Rhodes, and discovered that in three-hours' time, the locator got forty locations [R. 5407].

Following that investigation by appellant Henson, Henson signed a distributor's sales contract [Exhibit K-4], and became one of seventy or more distributors [R. 207]. Appellant Henson then undertook selling the vending machines as an incident to selling the book "Thunder God's

Gold," in the various schools, universities and libraries throughout the Country [R. 5410].

Appellant Henson was interviewed by a postal inspector in Seattle, Washington, and made a full, fair and complete disclosure of all of his activities for two hours, and the postal inspector told him in substance, that so far as he was personally concerned, he could see nothing wrong with what Appellant Henson was doing. This was never denied [R. 5469, Exhibit 154]. Henson gave the postal inspector a list of persons whom he had sold in Seattle November 21, 1945.

Subsequent to the indictment, Appellant Henson again made a full, fair and complete disclosure of his activities to J. H. VanMeter, the Los Angeles postal inspector, and inquired if he had done anything wrong, and was led to believe that his matter might or would be dismissed, but it never was [R. 5426 and 5428]. Appellant Henson attended no meetings with the distributors; the record shows there were none [R. 4334]. Likewise, there was no correspondence between the distributors or the manufacturer, defendant Rhodes, as to activities of distributors [R. 435, 437].

Appellant Henson had never seen or met any of the co-defendants, including Appellant Bridgman [R. 6308] prior to attending the 14 weeks of continuous trial in the Federal District Court except:

a. Defendant Earl H. Rhodes, whom Henson met twice, and

b. Defendant Ernest R. Alexander, who saw Henson once in the office. Alexander was acquitted.

As further evidence of good faith, Appellant Henson had no complaints about the glass in vending machines sold by him because he had cemented the glass in the vending machines with glass cement [R. 5413], and successfully and satisfactorily tested and demonstrated his machines to customer Henry B. Wiesley, by rolling them on a bed [R. 5384, 5413].

Relative to the credibility to be given two witnesses who testified concerning Appellant Henson, Henry B. Wiesley [R. 1809] identified Appellant Ernest H. Bridgman as Appellant Henson [R. 1809, 1810], and later admitted [R. 1852] that he had never seen Appellant Bridgman before. Mr. Wiesley, when asked by Counsel for the Government at the conclusion of his testimony, was still unable to identify Appellant Henson [R. 1872]. The witness Wiesley told Defendant Ernest R. Alexander (who was acquitted) in the hall of the Federal Building, that the reason Wiesley could not remember was because he had been drinking at the time [R. 5231, 5232]. This was not denied. Both Mrs. Henson and Appellant Henson testified that Mr. Wiesley had brought a bottle of whiskey to the room [R. 5382]. As evidence of the fact that Henry B. Wiesley's original complaint was entirely different than the complaints of the great majority of the 24 Government witnesses, Mr. Henry B. Wiesley's original complaint was slow deliveries [R. 1864, Exhibit 77], and witness Lawrence H. Liebrand's original complaint was set forth in Exhibit WW [R. 1958, 1974] which reads as follows:

“Gentlemen: I got my machines in fine shape but cannot place them in the places Mr. Henson contracted for as practically all of those places have ma-

chines which were put in from the time Mr. Henson was there till the time the machines arrived.

“P. S. Do you make a slug ejector and a small bracket for your machine.”

Mr. Liebrand had never seen Appellant Henson in his life before [R. 1892], and could not say whether or not the signature was Henson's.

Exhibit A (Distributor's Agreement), typical of the contract which each defendant distributor had with defendant, Earl H. Rhodes, was the only agreement in existence [R. 265, 267].

As further evidence of the absence of any possible scheme, the undisputed and uncontradicted evidence was and is that Defendant Rhodes was the sole owner of the vending machine manufacturing business and employed David McFarland, who took all directions and instructions from Rhodes, as an office manager and bookkeeper, but who saw Appellant Henson only once [R. 70, 84 and 87].

As further evidence of good faith, Henson was still sold on the machines because they had worked as well as any he had ever seen. He did not know of a single failure [R. 5430].

Perhaps the Court wonders why defendant Earl H. Rhodes was not convicted since the great bulk of the evidence was introduced originally concerning Defendant Rhodes, and then, on motion of the Government, was introduced in relation to all of the other defendants. I

would like to digress just a moment and enlighten the Court in so far as the evidence is concerned on why the jury could not agree, and that was principally because of the tremendous volume of evidence showing Mr. Rhodes' good faith, his absence of a specific intent to defraud, and how he dealt with the public as well as his distributors.

Briefly:

Rhodes sold twenty-three thousand one-cent machines [R. 377] and twelve thousand five-cent machines [R. 377].

The Government witness McFarland, Rhodes' book-keeper and manager, testified there were approximately two hundred complaints received, which were answered by McFarland on instructions from Rhodes [R. 377]. Five per cent of the complaints concerned nuts gumming up in the machines; fifty per cent were slow deliveries; and forty-five per cent were due to some defect or improper operation [R. 422]. The percentage of complaints was about ten per cent.

McFarland further testified that any defective machines, or any and all defective machines returned, were fixed by Defendant Rhodes at his sole cost and expense [R. 380].

Showing Rhodes' good faith further, Gordon B. Mansfield, an inspector, testified the machines were precision-built in that class of sandcasting; that the Government's Exhibit 50 was not a fair exhibit. It would not pass inspection because the base was ground irregular, defective, warped; the coin mechanism was fractured; the

corner of the top had been sawed off; the glass chipped; the lock loose, and was not a fair sample.

Inspector William K. Lawrence testified that ten per cent of the machines were rejected for defects at the factory [R. 4010].

In attempting to produce the best possible machine for the money, defendant Rhodes employed Melvin Christiansen, an experienced tool and die worker, and spent \$8,100.00 with him, perfecting and developing the machine [R. 4052], and Melvin Christiansen testified the vending machines were ninety per cent foolproof and "as good as we could build;" that Exhibit 109-F was precision-made as near as possible to production standards.

Horace J. Burrow [R. 4192], a wood and metal pattern man for 48½ years, testified the machines were precision-built to withstand the purposes for which they were built. Rhodes spent \$2,800.00 with Burrow and \$9,500.00 on testing the 5 and 1¢ machines.

As further evidence of good faith, the manufacturer, Defendant Earl H. Rhodes, had difficulty getting materials, particularly metal [R. 441, 442, 449].

Briefly, that is why the Defendant Rhodes was not convicted.

As further evidence to negative the theory of the Government on a scheme, I respectfully point out the facts relative to Appellant Bridgman in so far as they concern the Defendant Earl H. Rhodes and Appellant Henson. Appellant Bridgman rented space from the Los Angeles

Manufacturing Company, under a written distributor's agreement [R. 96]. McFarland received checks from Bridgman for rent. Each individual distributor (70 or more) had a written distributor's agreement with the Los Angeles manufacturer, which was Earl H. Rhodes, permitting him to sell vending machines and to purchase them from the manufacturer at an agreed price [R. 205, 207]. Distributors were procured by advertisements in the paper by Defendant Rhodes [R. 214], and that is exactly how Appellant Henson came into the picture.

Appellant Bridgman paid a monthly rental for his office space, kept separate books, employed his own help, and operated as an individual concern called the Bridgman Distributing Company [R. 229, 230].

The uncontradicted evidence shows that Defendant Earl H. Rhodes carried no social security or withholding taxes on any distributor; that each distributor traveled, and all expenses were borne by the distributors themselves [R. 239-241].

The only thing any distributor received was the difference between the purchase price and the amount he paid for the machine [R. 241, 242]. All distributors, including Henson and Bridgman, operated under the same contract.

The unfairness and the irony of the mass trial covering approximately 14 weeks is well illustrated by the fact that Appellant Henson had to sit in Court and listen to approximately 24 different Government witnesses from

various parts of the United States testify. Of said 24, only 4 mentioned Henson, to wit:

David McFarland who saw Henson only once [R. 87];

Lawrence Liebrand, who had never seen Henson in his life before [R. 1892];

Henry B. Wiesley, who identified Appellant Ernest H. Bridgman as Henson [R. 1809 and 1810]; and

The Los Angeles postal inspector, J. H. VanMeter, to whom Appellant Henson made said full, fair and complete disclosure [R. 5426 and 5428].

The Government has referred to Exhibit 27, on page 5 of their Brief, which concerns instructions to salesmen. In the first place, there were no salesmen, but each defendant was an individual contractor or distributor, and on June 30, 1948, at the trial, Defendant Rhodes testified in substance that he prepared Exhibit 27, but never sent it out to his knowledge to any distributor. The uncontradicted evidence throughout the entire trial was that Exhibit 27 was never received by any distributor, and never used by any distributor. In spite of this, on July 10, 1948, Exhibit 27 was read to the jury by Mr. Laven, Counsel for the Government.

With reference to the inconsistency of the verdicts, we have a situation as to all nine remaining defendants' motions for judgment of acquittal on 13 of the 18 counts, which were granted at the conclusion of the Government's case. At the final conclusion of the Government's case, Counts 3, 4, 7, 14 and 17 were submitted to the jury. Said 5 remaining counts cover the identical period of time from prior to August 14, 1945, and continuing to Novem-

ber 4, 1946; they also cover the identical essential elements of specific intent, one single scheme, as specifically described in Paragraph 1 of Count I, which is identical with Paragraph 1 of each and all of the remaining 17 counts, period for period and comma for comma. In short, the Court on 13 counts, and the jury on 4 counts, found Appellant Henson did not have the specific intent and that there was no single scheme, and in these 4 counts, we respectfully point out that the indictment and the facts as to the intent and the scheme were absolutely identical. Likewise, comparable to the letters in Counts 4 and 7, and all of Counts 3, 4, 7, 14 and 17, were introduced in evidence.

Appellant Henson is in this situation:

In 17 of the 18 counts, he had been found not to have the specific intent to defraud, and not to be a party in any scheme, 13 times by the Court and 4 times by the jury under absolutely identical pleadings, facts, transactions and dates. Yet, as to Count 7, under the identical set-up, we have one verdict of guilty. Can anyone reasonably say that said verdicts are consistent?

The same is true with Appellant Bridgman who was found not guilty 17 times and guilty once of Count 4 under said identical pleadings, facts, transactions and dates.

Certainly, the overwhelming weight of the evidence in so far as Appellant Henson is concerned points clearly and convincingly to the absence of any scheme and to the Appellant Henson's good faith and complete insufficiency of the evidence to prove bad faith, specific intent and said scheme. The question is then, how is it possible under these facts, to have a finding of guilty to Count 7? The

mass trial and guilt by association theory of the Government, covering 14 weeks of trial and concerning 20 Government witnesses, whom the Appellant Henson had never seen, met or heard before in his life, is the only logical, reasonable and plausible answer.

Where it is highly probable that error had substantial and injurious effect or influence in determining a jury's verdict, a reversal is required, notwithstanding that conviction would or might probably have resulted in a properly conducted trial.

Federal Rules of Criminal Procedure 52A, 28 U. S. C. A. 391;

Judicial Code Section 269;

U. S. v. Kotteakos, 328 U. S. 750, 66 Sup. Ct. 1239, 90 L. Ed. 1557.

So much for the facts. May I digress briefly on the theory. Respondent's brief presents a basis for affirmance of the verdicts rendered below—which we fear is sufficiently plausible that it might catch the judicial mind as a preferable alternative to a painstaking examination of the serious problems raised by appellants.

It is always easy for respondents to argue "There is sufficient evidence to support findings of guilt, the jury found guilt, *ergo* any errors committed the court below, however carefully they should be avoided, have not resulted in prejudice or in a miscarriage of justice. Hence, it follows, the judgments must be affirmed."

Right to Fair Trial.

But a realistic jurisprudence must regard a fair trial as of the essence. Even a correct result is a serious miscarriage of justice if the trial has been substantially unfair. We start with that premise. We cannot argue with anyone who does not grant it.

It is easy to dispose of a case in the manner suggested by counsel for the Government. If so done, a short opinion by the Court will be read by the profession in the advance sheets, and the probable mental comment will be, "Just another criminal appeal, no merit to it. Wonder why they appealed?"

On the other hand, if the Court comes to grips with the serious threat to our system of liberty and justice, which is implied in the nature of the proceeding below, we believe that the Court's opinion, although somewhat more lengthy, will prove a landmark in the extension and application of established common-law and Constitutional propositions, to a modern situation. We believe that reversal of this case on the grounds advanced will bring lasting credit to the American trial system and will be a long step toward elimination of the dangerous modern tendency to prove *guilt by association* through the mass trial technique.

For what did these defendants do? They were independent distributors. They beat the bushes to find customers for a new line of peanut-vending machines. Thousands, if not millions, of American citizens have earned, or tried to earn, their livelihood by this basic type of enterprise—salesmanship. A good salesman is, no doubt, seldom a paragon of virtue. Puffing is a legally recognized trait, to which no penalty attaches. Perhaps in

Utopia, a salesman would detail all the possible defects of his product, rather than using his talent and experience to stir up enthusiasm and demand, to close the deal. But such a Utopia would never have developed the vast economy which *laissez-faire* and *caveat emptor* built in America!

These men were convicted because of two documents which were transmitted through the mails, and we may, for argument only, assume that the jury found that somewhat untruthful statements were made by defendants to two individual customers.

These defendants did not even know each other. Each was convicted on the basis of a different document which passed through the mails. Yet, we are told that the majesty of our law allows the Government to force them to stand trial together—yea, with seven other independent distributors, each acting independently, for himself, and not for either appellant—for 14 weeks, for 59 trial days. What an ordeal! What an expense! Can the United States Government really do that to a business man merely because its bureaucrats believe that some untruthful statements were made in the course of a sale, in aid of which a document was transmitted through our mail channels?

And the jury—can any juror be expected to comprehend and recall the vast array of evidence of a 6,578-page transcript? And will inconsistent verdicts reaching impossible results be upheld on technical grounds, that by painstaking examination at that voluminous record, a trained lawyer can find that there was enough evidence for a reasonably logical man to believe that a particular piece of mailing matter was dropped in a postal box because

of a scheme to defraud? Or does the fact that Henson was acquitted of the count on which Bridgman was convicted, and Bridgman was acquitted of the count of which Henson was convicted, and no other defendants convicted at all, and several acquitted entirely [Clk. Tr. pp. 55, 57, 59, 63], and no verdict reached as to Rhodes (the only connecting link between the defendants) [Clk. Tr. p. 61], does that not prove conclusively that regardless of what amount of evidence of a "scheme" there was, the jury either disbelieved it or else failed utterly to comprehend the theory of the case?

Yet, the Government argues that the same Court which may set aside a civil verdict if the damages appear so excessive as to indicate passion or prejudice, has the duty to affirm verdicts such as were here rendered but which no sane man could honestly regard as fair and just!

For, if there was a scheme to defraud, Rhodes was the keystone of the arch. Without him there could be no scheme. Without him, you have wholly independent distributors operating in different areas, unknown to one another. Only if each man, operating under Rhodes, was operating for the purpose of defrauding his customers for his own benefit and that of Rhodes, can there be a scheme. For no one can rationally argue that Henson and Bridgman were, on the evidence, engaged in a joint scheme between themselves directly. Not even the jury was that confused, for it convicted each of a separate count of which it acquitted the other, Henson was doing nothing for Bridgman's benefit, Bridgman was doing nothing for Henson's benefit [Clk. Tr. pp. 56, 58].

The argument that the defendants were proved to be in one gigantic conspiracy is absurd (Resp. Br. pp. 17, 18).

Each defendant had business relations with Rhodes. The most that could be argued would be that Rhodes was engaged in eight separate conspiracies, one with each defendant.

But the jury rejected even that theory, by refusing to convict Rhodes of anything [Clk. Tr. p. 61; F. Clk. Tr. pp. 60-62].

And that is the kind of evidence on which the Government would argue that men should go to a penitentiary. Not if due process of law has any substance to it!

Let us look at the trial record! A vast array of witnesses paraded to the stand. Each was called against a particular defendant, reserving the right to offer the testimony against all defendants [*e. g.* R. 580].

In a two or three day prosecution, that practice might be tolerated. But what is the effect in a 14-week trial. For days and days, each defendant must, and did, listen to testimony about some other distributor of whom he never heard until he was indicted. He has no way to judge the truth and veracity of the witness, or the accuracy of his observation or memory. He has an attorney, paid to sit there and listen to it, but he cannot effectively consult with counsel about cross-examination or rebuttal, because he has no way to know how to defend himself against the testimony. *The only way he can be*

called upon to defend himself for what these strangers did is by the theory of guilt by association. Both defendants knew and did business with Rhodes, who also did business with other defendants, 70 or more distributors in all. Other than that, there was no evidence of combination, joint action, conspiracy, scheme, common plan, or other basis which the law has come to recognize as a legitimate foundation for requiring one man to defend himself against conduct committed by another fellow man.

The issue is clear. If this case can stand, then the seed is sown for guilt by association as a new development in American law, one fraught with even more unwholesome potentialities, which will in a short time lead to the undermining of all the cherished principles of our way of life.

In *Alford v. United States* (1931), 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77, a unanimous Supreme Court was persuaded that the essence of a fair trial was infringed when the trial court failed to allow defendant's counsel to establish on cross-examination that a certain prosecution witness was in Federal custody, and thus possibly biased. If the basis of a fair trial is undermined by such a relatively minor error on one trial court ruling, occupying only a few short minutes of time, *a fortiori*, it is respectively submitted, the trial below in this case was grossly unfair *in that for fourteen long weeks these defendants were forced to defend themselves against the insidious implications of responsibility for the conduct or misconduct of some other co-defendants.* If such a trial be fair, then

lawyers must revise their entire concept of the law of evidence, the due process clause, the speedy trial guarantee, and the basic precept of construction that “the enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people” (Ninth Amendment, U. S. Const.).

In the case of *Schaeffer v. U. S. A.* (1920), 251 U. S. 466, 471, 64 L. Ed. 360, 362, the theory of guilt by association was at least partially rejected by the Supreme Court in its refusal to hold liable the President and Treasurer of a newspaper for items inserted in the publication without their express knowledge. These men had been convicted of conspiracy to engage in subversive activity, but acquitted of eight counts of specifically engaging in such activity. The case is also, thus, a case on inconsistent verdicts, though the opinion does not place the reversal on said grounds.

If “express knowledge” is the rational criterion, then on what basis can the Government suggest that Henson and Bridgman were responsible for the conduct and language used by other defendants and by each other? On what fair basis of fact were these defendants joined for trial en masse with the other seven defendants who were made to stand trial?

We believe that the *Schaeffer* case, cited *supra*, is also clear authority against the idea of proving a scheme or conspiracy by mere proof of association. Knowledge of the unlawful acts of the purported accomplices is an es-

sential ingredient of proof—and one which was completely lacking in the case of Bridgman and Henson. The majority of the Supreme Court reversed the conviction of Messrs. Schaeffer and Vogel, without detailed discussion of the evidence, but we quote the comment of Mr. Justice Brandeis, concurring in said reversal:

“* * * there was no evidence of conspiracy except the cooperation of editors and business manager in issuing the publications complained of.” (251 U. S. 483, 64 L. Ed. 367.)

This Circuit Court, we submit, should likewise strike down this attempt by the Government to create a conspiracy or scheme out of inferences of cooperation, out of coincidences, out of similar business methods, out of fertile prosecutorial imagination, and out of the very weakest kind of circumstantial evidence of utterly no probative value to any reasonable man. In a dissenting opinion, Mr. Justice Clarke points out that the conviction of the newspaper's bookkeeper, one Lemke, should also be reversed because he clearly had no control over the policy of what the newspapers printed, legally or illegally (251 U. S. 496, 64 L. Ed. 373). We borrow again this logic: what proof is there that Bridgman or Henson had any policy-control over the business methods of any other co-defendants? The answer is crystal clear: None, nay not even knowledge of the names, persons or methods of the others. Only Rhodes, who was not convicted, had any relationship at all, direct or indirect, with these defendants or the other defendants!

Prejudice.

Someone may answer that granting the error of the misjoinder and the mass trial, where is the prejudice? Because the jury acquitted each appellant of any participation in the misconduct, if any, of his co-defendants. But we submit that the proper test is that such an unfair trial should lead to reversal in every instance, if our fundamental right to a fair trial is to be preserved. And we call attention to the rule in the *Haupt* case (136 F. 2d 661) that there is serious doubt that the jury can give a fair trial on one charge where a mass of incompetent evidence is admitted. The same rule of prejudice was used by the Supreme Court in the *Blumenthal* case, 335 U. S., 68 S. Ct. 248, 92 L. Ed. (A. O.) 183, at 190.

We submit that this proposition is vital: If A talks to B on a few days for a few hours and defrauds him of a few hundred dollars, and if those facts cannot be proved in a few days of trial time, then any fair system of justice would not allow conviction.

If it takes 14 weeks to prove that A defrauded B in a transaction which took only a few hours, then something is rotten in the state of our law on trial procedure.

This much is clear. It took 14 weeks because the government tried to prove these appellants guilty by association, by proving they were indirectly associated (without their knowledge) with other defendants who in turn made sales and representations to customers in other localities, all without and beyond these defendants' knowledge.

We call upon this Court, in all earnestness, to preserve, defend, and give substance to the great Anglo-American concept of a fair trial by holding explicitly that in these

United States the Government cannot conduct a mass trial of eight independently operating distributors, whose sole connecting link is through connection with a single manufacturer, also joined as a defendant, on the specious theory that all are joined in a single scheme to defraud; nor can that Government force American citizens to sit for fourteen weeks in a court room, under the heavy burden of expense to defend themselves, where the vast majority of the evidence offered concerns only separate, individual defendants, about which the co-defendants are unaware and unable to perceive any connection of it with themselves. For this Nation has not yet swept away the due process clause, nor the right to a speedy trial, nor the privileges and immunities of American citizenship, nor substituted for them the nefarious foreign ideologies which enshrine guilt by association as a proper test of criminality.

If this Court cannot, on this record, strike mortally at the trial-system involved below, or if it can uphold the inconsistent verdicts there reached as having done "substantial justice," then in the future all American business men would be wise to become pussy-footers, afraid to associate with any group, distributors who dare not sell but who only take unsolicited orders, merchants who make no statements about quality, and above all men who never use the mails.

It is one thing to prosecute a man for what he did himself. And if this case were broken into eight separate trials, each would be very short, if the evidence were limited to what each defendant did, plus any evidence the Government had to connect that defendant's fraud, if any, with a scheme of fraud centering on Rhodes. *And, after*

all, if such evidence would not convince a jury of said defendant's guilt, then is it fair that he be convicted?

We believe such separate trials would take only a few days each. If so, the total time would be less than the total of the trial below. And if the Government honestly believes it must require each defendant to answer for the conduct of co-defendants, of whom and of which he was not advised until trial, then we submit the Government is asking an unfair burden, and it is asking for the privilege of biasing the jury so that each man will not be convicted of his own fraud so much as of what the jury will come to regard as his inability to answer for the purported misbehaviour of other people whom he did not even know.

In all fairness, these men should either be convicted each of what he did himself, or acquitted. No man should be convicted of using the mail to defraud, because someone else he never heard of sent some mail containing untruths in attempts to sell similar merchandise to different customers in other areas. Even the jury, in their fantastically original inconsistency, seemed to realize, in part, this basic principle of fair-play.

Conclusion.

The mass trial of nine defendants for fourteen weeks on evidence, which taken in the strongest light against them, indicated eight separate, distinct schemes or combinations, defendant Rhodes engaging in each scheme with each other defendant, resulted in prejudice to appellants and in a miscarriage of justice in that, a vast array of evidence not connected with the appellant in any way was admitted against them by a blanket order of the trial court, in that appellants were thus subjected to a "Guilt

by Association” technique finding no warrant in Anglo-American jurisprudence and violative of the Fifth and Ninth Amendments, in that the numerous errors, detailed in appellants’ opening brief, resulted in rendering the trial unfair, and in that the jury’s verdicts and failure to reach verdicts as to other defendants establish conclusively that the jury was either completely confused by the erroneous mass trial or that they unreasonably or out of bias, prejudice, or passion, deliberately reached illogical conclusions.

Respectfully submitted,

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NOTE: This argument was written by counsel for Appellant Henson while being confined to a hospital bed in a full-length cast, with a multiple-fractured femur, following three months hospitalization before being operated on, and therefore, without the usual library privileges. The argument has been discussed with Mr. Bridgman’s counsel and they have authorized their names to be joined to the signature.

No. 12028.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST E. BRIDGMAN and JAY C. HENSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S WRITTEN REPLY ARGUMENT.

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S WRITTEN REPLY ARGUMENT.

*May It Please the Court and Counsel for the Defendant
Henson:*

The Written Argument of appellant Henson appears to be based upon the following grounds:

1. The good faith of the accused;
2. The credibility of the witnesses;
3. Appellants Henson and Bridgman did not know each other;
4. Appellant was an independent contractor;
5. Appellant was denied a fair trial because he was tried together with other defendants and the trial took 59 days.

GOVERNMENT'S REPLY.

I.

The Good Faith of the Accused Is a Jury Question.

Questions of good faith, honest belief, intentions and purpose are questions which are properly within the province of the jury to decide, and the jury having decided these questions against the appellant, the Appellate Court cannot consider these questions unless it is pointed out that there is no substantial evidence to warrant an inference of the guilt of the appellant.

Durland v. United States, 161 U. S. 306, 313, 314, 315;

Hawley v. United States, 133 F. 2d 966, 970 (C. C. A. 10);

Bradford v. United States, 129 F. 2d 274, 277 (C. C. A. 5);

Nassan v. United States, 126 F. 2d 613, 615 (C. C. A. 4);

Gates v. United States, 122 F. 2d 571, 575, 576 (C. C. A. 10).

If there was any conflict in the evidence, all conflicting inferences therefrom are resolved against the appellant.

Lemien v. United States, 158 F. 2d 550, 552 (C. C. A. 5).

II.

The Credibility of Witnesses Is a Jury Question.

Likewise the question of the credibility of the witnesses is strictly within the province of the jury and the Appellate Court will not concern itself with the credibility or comparative reasonableness of testimony.

Gage v. United States, 167 F. 2d 122 (C. C. A. 9);

United States v. Compagna, 146 F. 2d 524, 526
(C. C. A. 2), cert. den. 324 U. S. 867;

Craig v. United States, 81 F. 2d 816, 828 (C. C.
A. 9, 1936), cert. den. 298 U. S. 690.

ADDITIONAL SETTLED PRINCIPLES PERTAINING TO
APPEALS.

The following well-settled principles on appeal are an additional answer to appellant's contentions:

**(1) Appellate Courts Will Indulge All Reasonable Presump-
tions in Favor of the Trial Court.**

Appellate Courts will consider the evidence most favorable to the prosecution and will indulge in all reasonable presumptions in support of the trial court's ruling and draw all inferences permissible from the record, in determining whether the evidence is sufficient to sustain a conviction.

This Circuit has rather recently reiterated this familiar principle, in the cases of:

Gage v. United States, 167 F. 2d 122 (C. C. A. 9);

Henderson v. United States, 143 F. 2d 681 (C. C.
A. 9).

(2) **An Appellate Court Will Rarely Substitute Its Views on the Weight of the Evidence, for Those of the Jury.**

The fact that the Appellate Court might have reached a different conclusion from that of the jury, on certain questions involved, will not justify the Appellate Court in substituting its views on the weight of the evidence, for those of the jury. To this effect:

Jordan v. United States, 87 F. 2d 64, at p. 67 (C. C. A., D. C.).

(3) **The Weight of the Evidence Is a Jury Question.**

Normally, the weight of the evidence and the extent to which it was contradicted or explained away by witnesses, on behalf of the defense, is exclusively for the jury.

Crumpton v. United States, 138 U. S. 361.

(4) **The Sufficiency of the Evidence Is a Jury Question.**

The above rule has frequently been announced in this Circuit. Fairly recent cases of this Circuit, and of another Circuit, on this proposition, are the following:

Gage v. United States, 167 F. 2d 122 (C. C. A. 9);

Yoffee v. United States, 153 F. 2d 570 (C. C. A. 1);

Hemphill v. United States, 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627.

III.

To Sustain a Conviction for Violation of the Mail Fraud Statute (18 U. S. C. 338) It Is Not Necessary That the Participants Know Each Other.

The general rule is that a party to a conspiracy or scheme may have limited knowledge as to the scope thereof, the details of the plan, or the operations, and he need not have complete knowledge of the membership of the conspiracy or the part played by each of the members.

Marino v. United States, 91 F. 2d 691, 694, 696 (C. C. A. 9, 1937).

After a scheme commenced, those persons who entered the scheme with knowledge thereof, *i. e.*, to sell vending machines as directed by the defendant Rhodes, became partners in the scheme and were bound by all the acts and things done by all the participants both prior to that time and afterwards in furtherance of the scheme. A person may become a part of the scheme and yet have a very limited knowledge of the scope, the parties and details thereof. It has been held that *a person need know only the purpose of the conspiracy*. (Emphasis ours.)

In *Craig v. United States*, *supra*, this Court stated at page 822 as follows:

“Nor does the alleged fact that McKeon entered the conspiracy after it was formed by the appellants affect the existence of the general scheme. ‘Such a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other, or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a

plan to effectuate that purpose. A conspiracy is bottomed on an agreement to accomplish an illegal act, and without such agreement there can be no conspiracy; a conspiracy "is a partnership in criminal purposes." *Marcante v. United States* (C. C. A. 10), 49 F. (2d) 156, 157; *Johnson v. United States* (C. C. A. 9), 62 F. (2d) 32, 34."

See also:

United States v. Manton, 107 F. 2d 834, 848 and 849 (C. C. A. 2, 1938), cert. den. 309 U. S. 664;

Lee v. United States, 106 F. 2d 906 (C. C. A. 9);

Marino v. United States, 91 F. 2d 691 (C. C. A. 9, 1937);

Coates v. United States, 59 F. 2d 173, 174 (C. C. A. 9).

The reporter's transcript fully supports that:

The appellant understood the purpose of the scheme, *i. e.*, to sell vending machines; he used the same plan and scheme which was devised by the defendant Rhodes to procure prospective victims by placing a false ad in a newspaper which read that an established vending machine route was for sale well knowing that no such route had been established by him or anyone else; appellant used the same brochures prepared and furnished by Rhodes which stated that there was nothing in the vending machines to get out of order, were 100% foolproof, and absolutely no risk involved, etc., knowing that each statement was false and fraudulent. A definite pattern was adhered to; the logical inference is the adoption of a common scheme. If any one of the material representations made

were false and known to be false and purchases were made in reliance thereon, the conviction must be sustained.

Lewis v. United States, 38 F. 2d 406, 410 (C. C. A. 9).

Each salesman was required to collect at least 50% down, and all the checks or remittances were made payable to Los Angeles Manufacturers (a fictitious firm name used by Rhodes), which were received by him and deposited to his own bank account; that salesman did not receive the final payment from Rhodes until the purchaser paid in full for the machine. Defendant Rhodes furnished the sales agreements and other literature containing instruction to the salesmen how to procure and make sales and sent by mail an acknowledgment of each order to the purchaser. The prime essential element is the use of the mails for the purpose of executing or attempting to execute a fraudulent scheme.

Marshall v. United States, 146 F. 2d 618 (C. C. A. 9).

The appellant knew that every order sent in to defendant Rhodes would be acknowledged by him and upon shipment of the order a sight bill of lading would be sent through the mails.

It was not necessary that each of the schemers know the other. See:

United States v. Cohen, 145 F. 2d 82, 87, 88, 90 (C. C. A. 2), cert den. 323 U. S. 799;

Lefco v. United States, 74 F. 2d 66, 69 (C. C. A. 3).

The appellee submits that the appellant understood the venture and knew the scheme in all its details and that by direct testimony and the inferences drawn from the evidence, the jury could rightly find that the appellant knew the purpose of the scheme.

In *Blumenthal v. United States*, 332 U. S. 539 (an affirmation of the Ninth Circuit Court of Appeals, 158 F. 2d 883), at page 556, it is said:

“And not all of those joining in the earlier ones make known their participation to others later coming in.

“The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others.”

Marino v. United States, 91 F. 2d 691 (C. C. A. 9, 1937);

Lefco v. United States, 74 F. 2d 66 (C. C. A. 3);

Jezewski v. United States, 13 F. 2d 599, 601 (C. C. A. 6);

Allen v. United States, 4 F. 2d 688, 690 (C. C. A. 7).

And the language in *Blumenthal v. United States*, above noted, is applicable where it is said at page 558:

“The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.”

The record clearly supports the finding of the jury that there was a purpose—to dispose of vending machines designed and manufactured by the defendant Earl H. Rhodes by means of false representations and the mails were used in the furtherance of this scheme.

IV.

The Evidence Was Sufficient to Warrant the Jury Finding That the Appellant Was Not an Independent Contractor.

The appellant further contends that he was an independent contractor and therefore comes within the confines of the *Kotteakos* case, 328 U. S. 750. Part of the plan and scheme was to call the salesmen *distributors*. However, such designation did not actually make them *distributors* for the facts clearly demonstrate that they were merely agents and co-conspirators of the defendant Rhodes. The jury was justified in so finding, and the appellee submits that the common purpose of selling vending machines for the defendant Rhodes, in the manner which we have already outlined, was sufficient for the jury to draw an inference that he was not an independent contractor.

The case of *Blumenthal v. United States*, *supra*, substantially disposes of appellant's contentions concerning the existence of several independent conspiracies rather than one general conspiracy. It is enough, knowing that concerted action was contemplated and invited, and that the appellant gave his adherence to the fraudulent scheme and participated in it.

V.

No Reversible Error Was Committed by Trying the Appellant Together With Co-Schemers in a Trial Which Took 59 Days.

The *Kotteakos* case, relied upon by the appellant, does not support his contention that he was denied a fair trial because several defendants charged under the mail fraud statute were tried jointly. (See pages 13 and 14, Appellee's Brief.) Those joining in a scheme to use the mails to defraud take the risk of being tried together and cannot complain unless some prejudice has been shown. The appellee submits that the record shows that the court was zealous to protect the rights of the appellant, and that the delays, if any, were caused by the procrastination of the appellant himself. It is not unusual when many are charged in a conspiracy or scheme that considerable time is necessary to fairly present the case before the jury; *e. g.*, in the conspiracy trial of *United States v. Foster, et al.*, involving eleven Communists tried in the Southern District of New York before Judge Harold Medina, the trial commenced on March 7, 1949, and ended on October 14, 1949, consuming 33 weeks.

The record is silent in this case of any request by the appellant for a severance and, therefore, by his failure to so request, he has acquiesced and consented to a joint trial.

Finally, appellant has failed to show that during the trial his substantial rights have in any manner been prejudiced.

Conclusion.

We respectfully submit that the evidence upon which the jury found appellant guilty plainly furnishes adequate support for that verdict.

Appellant had a fair and full trial. There is no reason for setting aside the verdict of the jury, and the judgment should be affirmed.

Respectfully submitted,

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No. 12028
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ERNEST H. BRIDGMAN and JAY C. HENSON,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the
Southern District of California
Central Division

HON. JACOB WEINBERGER, JUDGE.

APPELLANTS' OPENING BRIEF.

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Appellants,

vs.

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Appellee.

APPELLANTS' OPENING BRIEF.

Introductory Statement.

Appellants present herewith their joint opening brief.

The indictment charges twenty-seven defendants with an alleged violation of U. S. C. Title 18, Section 338—Mail Fraud—in eighteen separate counts. The indictment was dismissed as against eighteen of the defendants; the case was tried as to nine defendants only. Of the nine defendants, four were found not guilty on all eighteen counts. The Court declared a mistrial as to three of said defendants, Earl H. Rhodes, Richard L. Sippel, and Ray F. Martin for the reason that the jury could not reach a verdict after approximately 102 hours of deliberation. Appellants Ernest H. Bridgman and Jay C. Henson were each acquitted on seventeen of said eighteen separate counts in said indictment. Defendant Ernest H. Bridgman was found guilty on Count IV only, and defendant Jay C. Henson was found guilty on Count VII only.

The indictment (18 counts) covers a period from prior to August 14, 1945, and continuing to November 4, 1946—as described in detail in paragraph 1, pages 1, 2, and lines 1 to 19, inclusive, of page 3 of the indictment. These identical facts, dates and names, are incorporated by reference in the remaining seventeen counts as paragraph 1 of each count. The only possible difference between the individual 18 counts consists of paragraph 2 of each count (approximately 7 lines) which concerns an individual letter which the *defendants* are charged with causing to be placed in the mail—for the purpose of executing the aforesaid scheme and artifice, and attempting to do so.

At the commencement of the Government's case motions for judgment of acquittal were made by all nine defendants. Motions were denied. [R. 45, 54, 55.]

At the conclusion of the Government's case a motion for judgment of acquittal for all nine defendants was made and granted as to 13 counts in the indictment; denied as to Counts III, IV, VII, XIV and XVII. [R. 3536-3538.]

The case was tried for approximately 59 trial days, covering approximately 14 weeks. At the conclusion of the evidence motions were again made for judgment of acquittal by all defendants on the remaining Counts III, IV, VII, XIV and XVII. Motions were denied. [R. 3538.] August 11, 1948, motions for judgment of acquittal or for a new trial were made in behalf of both appellants and denied. [R. 5, 15.]

The indictment specifically charges that from August 14, 1945, and continuing to November 4, 1946, defendants (27 named) devised and intended to devise a scheme and artifice to defraud purchasers and prospective purchasers

of certain vending machines—and to obtain money and property by means of following false and fraudulent schemes—well knowing at the time that the pretenses, representations and promises would be false when made (14 specifications are listed).

The facts showed that defendant Earl H. Rhodes was the sole owner of the Los Angeles Manufacturing Co., which was engaged in the business of manufacturing 1 cent and 5 cent vending machines. Defendant Earl H. Rhodes advertised for distributors to sell said vending machines under a distributor's contract. There were seventy or more distributors. [R. 207.] Twenty-seven of the seventy were indicted. Appellants are two of the twenty-seven.

Appellant Ernest H. Bridgman, as to Count IV, and appellant Jay C. Henson, as to Count VII, respectfully complain:

1. That the verdicts, as to each of said two counts, are inconsistent with the verdicts as to the remaining four counts submitted to the jury in that they cover the identical period of time from prior to August 14, 1945, and continuing to November 4, 1946; they also cover the identical essential element of specific intent, one single scheme, as specifically described in paragraph 1 of Count I, which is identical with paragraph 1 of each and all of the remaining seventeen counts.

2. That appellants were and are the victims of a mass trial in that appellants were compelled to sit in a court room for 14 weeks and listen to testimony of witnesses

from several different parts of the United States, the majority of whom had never seen or met appellants—particularly after the United States Attorney filed a written trial memorandum in the trial court, stating “That he expected to call approximately 25 witnesses, that the trial would require 3 weeks and that he expected the trial would be had on all counts.”

3. That prejudicial error was committed in the Court’s blanket introduction of the testimony of all witnesses against all defendants. This point, closely related to our mass trial objection, is in effect an exception to a gross example of the “guilt by association” technique. The only connecting link between the several defendants was the fact that they engaged in the same general line of business, the sale of vending machines. There was no conspiracy, actual or constructive, no partnership, no joint enterprise, no agency or other mutual relationship to establish a foundation for the evidence so sweepingly admitted.

4. That there was no substantial evidence to establish a “scheme” in which appellants jointly participated, within the meaning of 18 U. S. C. A. 338.

5. That the Court committed prejudicial misconduct in refusing to advise the jury that one co-defendant has the right to cross-examine the witnesses called by another co-defendant.

6. That the Court committed prejudicial error in limiting cross-examination, under the rule of *Alford v. United States*.

Statements of the Pleadings and Facts Disclosing the Basis of Jurisdiction.

JURISDICTION OF THE DISTRICT COURT.

The conviction and judgment from which the appeal is taken was based upon an indictment returned and filed by a grand jury in the District Court of the United States for the Southern District of California. In this indictment, twenty-seven individual defendants are charged with violating U. S. C. Title 18, Section 338 (Mail Fraud) in eighteen consecutive counts in that prior to August 14, 1945, and continuing to November 4, 1946, said twenty-seven defendants devised and intended to devise a scheme and artifice to defraud purchasers and prospective purchasers of certain vending machines—and that under various names, would induce to purchase certain nut vending machines, known as Star 1¢ Vendor and Sun 5¢ Vendor, and obtain money and property by means of following false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made. The indictment then lists approximately fourteen separate alleged misrepresentations, and in the following paragraph, it refers to a letter which defendants allegedly authorized to be placed for deposit in the United States mail to a certain individual. Except for a seven line paragraph (number 2) concerning an individual letter in each of the eighteen counts, all counts are identical.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court appears from the indictment and the pleas of not guilty and the Notice of Appeal. Jurisdiction is invoked under Section 128 of the Judicial Code as amended (U. S. C. A. Title 28, Chapter 6, Section 225A).

I.

Inconsistent Verdicts Require Reversal.

Appellants are two of nine defendants who were tried jointly for violation of the mail fraud statute, from about August 14, 1945, and to November 4, 1946, as described in detail in paragraph I on pages 1 and 2, and lines 1 to 19, inclusive, of Count I of the indictment.

These same allegations, dates and names are reincorporated by reference in the remaining seventeen counts.

The case was tried for approximately 59 trial days, covering fourteen weeks, as to Counts III, IV, VII, XIV and XVII. One single scheme was alleged in each count.

Defendants Alexander, Carner, Johnson and Wilson were acquitted on all five counts.

Appellant Bridgman was acquitted on Counts III, VII, XIV and XVII, and found guilty as to Count V only.

Appellant Jay C. Henson was acquitted on Counts III, IV, XIV and XVII, and was found guilty as to Count VII only.

The jury were excused on their report of inability to agree as to the findings as to the other three defendants, Rhodes, Martin and Sippel.

Appellant Henson sat in court and listened to the testimony of twenty-four Government witnesses for approximately fourteen weeks, during which time only three testified concerning him. [David McFarland, R. P70, 120; Henry B. Wiesley, R. 1796; Lawrence H. Leibrand, R. 1886.] During the same fourteen weeks only five of the twenty-four Government witnesses testified concerning Ernest H. Bridgman. [David McFarland, R. 96; Harry L. Raymond, R. 2347; James Warshim, R. 2571 (and at the conclusion of James Warshim's testimony all of it was

stricken [R. 3559, line 15]); Marshall J. Hendricks, R. 2952; and Stephen Littlefield, R. 3001.] At the conclusion of the Government's case all of the evidence, theretofore introduced in relation to one particular defendant, was introduced, over objection of all defendants, in relation to or against all defendants. [R. 3536.]

Ernest H. Bridgman and Jay C. Henson, appellants, had never known each other, had never met each other, and had never seen each other prior to coming to court as defendants in this case. [R. 6308, 5322, 5403.]

The logical inconsistency of the verdicts is indisputable. Messrs. Bridgman and Henson did not even know and had never met each other. [R. 6308.] The sole connecting link between them was the central figure, defendant Rhodes, with whom each was acquainted. Mr. Rhodes was the author of the letter [Exhibit 10] on which Count VII was based and of which appellant Henson was convicted. Further, Mr. Rhodes mailed this letter in Los Angeles while Mr. Henson was in Iowa. It is therefore obvious as a matter of law that if Henson was guilty under the seventh count, *a fortiori* Rhodes was guilty, equally, if not more clearly guilty. Yet the same jury which voted Henson's conviction could not agree whether Rhodes had the requisite *mens rea*. No one but a sophist would even care to argue that such reasoning was fair, honest or logical. Unfortunately, too much Grecian sophistry has been introduced into some cases on this subject of what verdicts will be upheld in spite of their unintelligibility on rational grounds. It would seem that the mass of irrelevant testimony and the long, harassing trial confused the jurors or so prejudiced them, or some of them, either against these appellants or in favor of Rhodes, that fair and consistent findings were rendered a

practical impossibility. Only a series of impossible compromises could and did result.

It is easy to argue that these appellants should not escape just because a jury wrongfully or inconsistently failed to render justice to another accused. It is difficult to affirm positively that a jury so constituted gave a fair and impartial verdict against these appellants. It is obvious that the jury was either unfair to these appellants or that it was unfair to the Government in its deliberations and verdicts, or unfair to all parties. Due process of law and good logic should both require that this unfairness should be resolved in a new trial. The Government automatically will get a new trial as to Rhodes, but these appellants will not obtain that new trial unless this Court so orders.

The case law on inconsistent verdicts is by no means simple or easy to apply. Its origin traces to comparatively uncomplicated factual situations, as for example, where three men were jointly indicted for conspiracy and the verdict found that *A* conspired with *B* or *C*. At common law such an alternative verdict was void.

Regina v. Thompson, 16 Q. B. 832.

Similarly where many were indicted for riot but only two were convicted, the verdict was void since at common law the minimum number who could riot was three.

2 Hawkins, *Pleas of the Crown* (8th ed. 1824) 621.

It is well to bear in mind, in examining this problem of review of illogical verdicts, the sage remarks of the great common law authority, Sir Wm. Blackstone, in his *Commentaries* (1772), Volume 3, Chapter 23, page 381, said:

“Yet, after all, it must be owned, that the best and most effectual method to preserve and extend the

trial by jury in practice, *would be by endeavouring to remove all the defects*, as well as to improve the advantages, incident to this mode of enquiry * * *.” (Italics supplied.)

If the same offense is charged in two counts of an indictment, or in two indictments consolidated for trial, acquittal on one count will bar conviction on the other. The test is whether the same evidence will support both counts.

Hughes v. U. S. A. (C. C. C. 5th 1938), 95 F. 2d 538.

Where a verdict of guilty on one count and not guilty on other counts is rendered, the verdict of guilty must be based upon evidence other than that pleaded in support of other counts.

John Hohenadel Brewing Co. v. U. S. A. (C. C. A. 3rd 1924), 295 Fed. 489.

Where the elements of two offenses are identical, a verdict of not guilty on one count is inconsistent with a verdict of guilty on the other.

People v. Doxie (1939), 34 Cal. App. 2d 511, 93 P. 2d 1068.

When accused is convicted on one count and acquitted on another count, the test is whether the essential elements in the count wherein accused is acquitted are identical and necessary to proof of conviction on the guilty count.

People v. Hickman (1939), 31 Cal. App. 2d 4, 87 P. 2d 80;

Commonwealth v. Kline (Penn. 1933), 107 Pa. St. 594, 164 Atl. 124.

SINGLE OFFENSE IN SEVERAL COUNTS.

Where but one offense is charged in several counts, a verdict of guilty on one count and of not guilty on another is inconsistent and will not support a judgment. And the verdict of an acquittal operates as the acquittal of the offense, although the accused is found guilty on the other count.

State v. Akers (1919), 278 Mo. 368, 213 S. W. 424;

People v. Puppil (1929), 100 Cal. App. 559, 280 Pac. 545.

It is conceded that if the same offense is charged in two counts of an indictment, or in two indictments consolidated for trial, the acquittal of one count will bar conviction on the other.

Speiler v. U. S. A. (C. C. A. 3rd), 31 F. 2d 682;

Bertsch v. Snook (C. C. A. 5th), 36 F. 2d 155;

Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153 (Held, no reversible error because the possession and conspiracy were determined to be different offenses).

In criminal prosecutions, verdicts in a number of cases impossible in legal theory because of the nature or the kind of offense or offenses in question have been held void.

People v. Richard, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716;

People v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168;

Annotation, 80 A. L. R. 171.

When the liberty of a citizen is at stake, the jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time.

Speiler v. U. S. A. (C. C. A. 3rd 1929), 31 F. 2d 682.

Where the inconsistency of a verdict appears only from an examination of the evidence and constitutes an illogical discrimination between joint defendants, as to which the evidence is identical, it is invalid. Thus, where two persons were jointly indicted and tried for an unlawful sale of liquor, and the evidence against each was precisely the same, it was held that a verdict finding one defendant guilty, the jury disagreeing as to the other, should be set aside.

Davis v. State (1898), 75 Miss. 637, 23 So. 770, 941.

So, where the evidence against four persons jointly indicted and tried for theft is precisely the same, the jury upon finding three of the defendants not guilty, cannot be permitted to find the fourth guilty.

Territory v. Thompson (1929), 26 Haw. 181.

FEDERAL CASES.

Several Federal cases have been cited and argued by counsel for all parties in earlier stages of this case, and it is appropriate to re-examine them on this appeal.

In *Kotteakos v. U. S. A.* (1946), 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, one of the reversible errors was held to be the utter impossibility of the jury's implied finding of a single conspiracy on evidence which indicated multiple schemes. The same situation here prevails, inasmuch as it is logically impossible to affirm that two defendants, each unacquainted with the other, are guilty participants in a systematic mail fraud, while at the same time, other similarly situated businessmen are innocent and the ringleader and some others are not proved either guilty or innocent by the evidence.

The rule in *Muench v. U. S. A.* (C. C. A. 8th 1938), 96 F. 2d 332, is that the jury's findings of innocence on other counts cannot require reversal of otherwise consistent verdicts on the counts as to which convictions were returned. The case would seem to recognize that inconsistency as to a specific count, as between co-defendants, is prejudicial error.

In *U. S. A. v. Hare* (C. C. A. 7th 1946), 153 F. 2d 816, the Court refused to nullify an allegedly inconsistent verdict which convicted corporate officers of sales over ceiling prices while acquitting the corporation. In such a situation the corporation could not possibly be guilty unless the *persons* who acted on its behalf, either as agents or as co-principals, were guilty. The evidence was clear and no particular *mens rea* was in issue. The apparent inconsistency did not therefore result in a miscarriage of justice. Such facts are a far cry from a situation where Henson is convicted for what Rhodes did by a jury which in its utter confusion or irrational bias was unable to determine whether Rhodes was guilty or innocent.

Likewise, the case of *Chiarvalloti v. U. S. A.* (C. C. A. 7th 1932), 60 F. 2d 192, is, by analogy and extension, a precedent for reversal here. There one defendant was convicted and the other acquitted of a joint charge of attempting to bribe a public official. The Court stated clearly that “* * * the evidence was not the same in all respects.” But no one can argue that where *A* sends a letter and the jury convicts *B* but not *A* of sending such letter, that the evidence is not the same in all essential respects.

The Government has relied heavily on the majority viewpoint of Mr. Justice Holmes in *Dunn v. U. S. A.* (1932), 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161. The case, however, is clearly distinguishable, since it merely laid down the rule that inconsistent findings as to separate counts do not constitute reversible error. The 8th Circuit has so regarded the case in *Downing v. U. S. A.* (C. C. A. 8th 1946), 157 F. 2d 738, stating:

“The Dunn case settled the question, however, when the Supreme Court refused to reverse a conviction for inconsistency in verdicts on the separate counts of an indictment * * *.”

In considering whether the rule of *stare decisis* should lead the Court to apply or extend the doctrine of *Dunn v. U. S. A.*, cited *supra*, to affirm the inconsistent verdicts in this case, it is well to call to mind the comment which Blackstone made on the fact that the English Courts foolishly followed certain technical and unfounded precedents over a long period of time:

“The precedents then set were afterwards most scrupulously followed, to the great obstruction of justice, and the ruin of the suitors; who have formerly suffered as much by these obstinate scruples and literal strictness of the courts, as they could have done even by their inequity.”

3 Blackstone's Commentaries (1772), Ch. 25, p. 410.

Inconsistent verdicts are likewise considered beneath the standard required for judicial approval in civil cases.

East St. Louis Cotton Oil Co. v. Skinner Bros.
(C. C. A. 8th 1918), 249 Fed. 439 (Reversing a verdict for plaintiff on an account stated which also found for defendant on an inconsistent theory of special contract alleged in a counter-claim).

A compromise verdict is objectionable where there is an unjustifiable concession of principles controlling the decision.

Goelet v. Ward Co. (C. C. A. 2d 1917), 242 Fed. 65.

SUMMARY.

Although we concede that some plausible argument can be weakly made on the basis of some prior cases that inconsistent verdicts, such as were here rendered, may be upheld, nevertheless we earnestly contend that such precedents are out of line with the weight of respectable authority and wholly inconsistent with anything but sophistry as a theory of the administration of justice. The verdicts here rendered were eminently unfair. No case should be started, or tried, and no defendant should be punished, on the theory that a jury may convict some defendants, while acquitting and disagreeing as to others, in a highly illogical fashion. The same law which requires reasonable doubt to be resolved in favor of defendants can certainly not vest unreasonable and irrational discretion in a jury.

II.

Unconstitutional Mass Trial and Prejudicial Misjoinder Require Reversal of Judgments.

The two appellants were tried under an indictment containing eighteen counts and naming twenty-seven defendants. As to eighteen defendants, it was dismissed, and the remaining nine were tried before a single jury. These two alone were convicted, each on a single count of the indictment, each under a different count, and each being acquitted on other counts. Of the other defendants, four were entirely acquitted and as to three, the jurors disagreed. The trial consumed fifty-nine court days. The reporter's transcript contains 6578 pages. The trial lasted from May 5, 1948, to August 8, 1948, a three-month period.

The defendants and appellants frequently and repeatedly objected to the mass trial and to its consequent effects of duplication, repetition, delay and harassment. [R. 2691, 2693, 2694, 3353, 3382, 3555, 3575, 3576, 3577, 3900, 3953, 3954, 4150, 4686, 4687, 4689, 4694, 4695.] All objections were overruled by the Court.

No one could foresee, when the trial commenced, that the prosecution would delay the trial and deprive defendants of any semblance of a speedy and fair trial. The able prosecutor estimated, in fact, that the trial would last three weeks. (Govt. Trial Memo, par. I, E.)

No direct case authority has been found establishing a rule that it is unconstitutional or reversible error to conduct such a mass trial for fifty-nine days. However, it seems elementary that due process of law and the right to a fair and speedy trial place some maximum limit on the time which the prosecutor and the trial court can force defendants to spend in litigation of a criminal indictment.

Surely five years, three years, or even one year would be clearly beyond all reason in a case of this nature, and careful reflection will make it evident that fifty-nine trial days is far beyond the discretion which a trial court should have in a free country to make citizens defend themselves against such charges as were here involved. If every American citizen and businessman can be subject, at the Government's will, to the bankrupting harassment of this type of prosecution, then the vaunted civil liberties which are our proud possession may be substantially nullified and crushed by such cruel and inhuman prosecution tactics.

General language concerning the background of the applicable constitutional provisos, and the *ratio decidendi* of leading cases, may be cited and quoted in support of the proposition here contended for. The right to a speedy trial would be meaningless if it is a right only to a trial which *begins* in a reasonable time after indictment, and if it does not include the right not to have the trial bog down in irrelevant detail and a mass of evidence relating to others and not connected up with these individual defendants and appellants. In *Shepherd v. U. S. A.* (C. C. A. 8th 1947), 163 F. 2d 974, the Court said, regarding the Sixth Amendment:

“The constitutional provision was intended to prevent the oppression of the citizen by delaying criminal prosecution for an indefinite time and to prevent delays in the administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in the trial of criminal prosecutions. *A speedy trial, generally speaking, is one conducted according to prevailing rules, regulations and proceedings of law, free from arbitrary, vexations and oppressive delays.*” (Italics supplied.)

The purpose of a speedy trial has been elsewhere described as a protection from the harassment of criminal prosecution, and from the attendant anxiety and the danger of the loss of witnesses through delay.

Ex parte Peckcrill (D. C. Tex. 1942), 44 Fed. Supp. 741.

The Supreme Court fairly recently reversed a conviction, partially upon the ground that a vast amount of legally irrelevant evidence had been admitted, tending to indicate some eight different conspiracies, where the indictment had charged a single confederation. The Court, speaking through Mr. Justice Rutledge, said:

“The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place. * * * [The defendants have] * * * the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others * * *.”

Kotteakos v. U. S. A. (1946), 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, 1571-1572.

It is submitted, with all respect to the learned trial judge, that if a Court can be permitted to try and convict these appellants “*en masse* for the conglomeration of distinct and separate offenses committed by others,” as shown in the record—for a three-month period—then the language of Mr. Justice Rutledge in the *Kotteakos* case is without substance, and a new form of tyranny has been invented by which a growing bureaucracy can harass and punish citizens in spite of the proud and specific guarantees of our Constitution.

The mass trial procedure of allowing numerous witnesses to testify against a single defendant—reserving the right to offer such testimony against the others—substantially deprived the appellants of the constitutional right to be *confronted with the witnesses against them*. Although the counsel for each appellant was permitted to cross-examine each witness, it would be obvious that counsel could not adequately cross-examine a witness without knowing for sure whether the testimony would even be offered against his defendant. And if the evidence were later offered, after counsel had declined to examine, the defendant would in effect be subject to a witness who had not been cross-examined.

Where the practice is used as to only a few witnesses, as in a conspiracy trial, perhaps prejudice would not ensue. But in a mass trial for seventeen weeks, defense counsel were placed in a dilemma—either they cross-examined and thus gave the jury the psychological inference that the witness had said something against appellants—or they failed to examine and thus neglected their clients' defense in case the testimony was thereafter admitted against their clients.

It is submitted that placing counsel in such a dilemma is a substantial and prejudicial deprivation of the right of confrontation of witness, as contained in the Bill of Rights, Sixth Amendment, United States Constitution.

MISCARRIAGE OF JUSTICE.

Misjoinder of separate offenses by separate individuals, unknown to one another, has been held prejudicial, even in situations where the trial *en masse* did not result in burdensome delays.

The leading case on this particular subject is that of *McElroy v. U. S. A.* (1896), 164 U. S. 76, 41 L. Ed. 355, 17 S. Ct. 31. In the *McElroy* case four indictments were consolidated for trial. The first indictment charged the murder of *A* by all six defendants. The second indictment charged a felonious assault on *B* by all six defendants. The third indictment charged arson of *C*'s house by all six defendants. The fourth indictment charged arson of *D*'s house by four of the six defendants. The crimes in the third indictment occurred two weeks after the offenses described in the other three true bills. The jury convicted five of the defendants. The United States Supreme Court reversed the convictions and spoke very caustically of the practice of "embarrassing the defense" by a "multiplicity of charges." The Court, speaking through the Chief Justice, said (at p. 81, 41 L. Ed. at 357):

"* * * such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. *It cannot be said that in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions* * * *." (Italics supplied.)

The general principle of the *McElroy* case, it is submitted, is basic to any concept of a fair trial. If the defense can be embarrassed and the jury's attention diverted in a case involving only *four* defendants on trial for *four* transactions on *two* days, how much more obvious is the prejudice where *nine* defendants are tried for *eighteen* separate transactions, occurring on many different dates

over a period of *fifteen* months! (Count One of the Indictment.)

The defenses of the several defendants here were antagonistic in this sense: they were not mutually acquainted; they did not cooperate in any way in the sales program; each made his sales individually and his alleged representations and conversations should not be binding on the others in any fair system of justice.

Cf.:

U. S. A. v. Noble (D. C. Mont. 1923), 294 Fed. 689;

U. S. A. v. Rockefeller (D. C. N. Y. 1915), 222 Fed. 534;

People v. Lehne (1935), 359 Ill. 631, 195 N. E. 458.

CONSPIRACY DIFFERENTIATED.

It is true that where a large number of parties conspire to defraud, they *invite* a mass trial, and if one results they are hardly in a position to complain. See, for example, the mass trial of fifty-seven conspirators in *U. S. A. v. Gilbert* (1939), 31 Fed. Supp. 195. The *Gilbert* case points up the gross injustices of a mass trial, but finds justification in the common knowledge of the defendants that they were participants in a huge conspiracy.

Here, however, the several defendants had no reason to suspect that they were doing anything illegal, much less anything indicative of a major conspiracy or even of a joint scheme to use the postal facilities to defraud. They did not invite a mass trial in any sense.

In the case of *Castellini v. U. S. A.* (C. C. A. 6th 1933), 64 F. 2d 636, the Court reversed convictions upon a consolidated trial of three persons under two indictments. The Court said, in part (at p. 638):

“We cannot but regard it as prejudicial to the right of appellant to a fair and impartial trial that

he should be required to stand trial at the same time and before the same jury upon 25 counts of one indictment, each charging him (the bank president) jointly with two others with a felony, and upon two counts of another indictment, each charging him jointly with one other with another and distinct felony. We cannot overlook the rule in the McElroy case, *i. e.*, that appellant should not, according to the ancient formula 'be confounded in the making of his defense' * * *.

"The necessity for the rule cannot be better demonstrated than by the course of the trial, which continued for something like two weeks, and which is reflected in a bill of exceptions of 580 pages. In addition the government introduced more than 200 documents, exhibits, . . . mostly on one count.

. . .

"We cannot say that these errors did not prejudice appellant in his substantial rights." (Italics supplied.)

If such a *two week* trial on *two* indictments of *three persons*, with 580 pages of transcript and 200 exhibits is confusing to a jury, it would seem to require considerable mental flexibility to stretch the rules of a fair trial to cover up the confusion shown in the 6578 page record here of a *fourteen week* trial!

Compare, also, the trial of *nine* defendants for conspiracy and *five* defendants for sale of opium, which was reversed for improper consolidation.

De Luca v. U. S. A. (C. C. A. 2d 1924), 299 Fed. 741.

SUMMARY.

It thus appears that the mass trial of these appellants, along with the other defendants, occurred under conditions which prevented a fair trial and therefore requires a reversal of the judgments.

III.

Prejudice Ensued From Blanket Order Admitting All Evidence Against All Defendants.

The admission against appellants, by a sweeping order of the trial court, of a mass of incompetent, irrelevant and immaterial evidence of witnesses who had originally testified only in relation to other defendants rendered the trial unfair and unconstitutional, and deprived each appellant of his right to be confronted with the witnesses against him and to cross-examine such witnesses. Moreover, it constituted judicial misconduct which biased the jury.

No tenet is more highly enshrined in our constitutional and common-law system than the principle that no man may be convicted of a crime unless there is either direct or circumstantial evidence of his personal guilt thereof.

We do not recognize the Marxian-fascist-totalitarian "guilt by association" process. Nor do we allow a man to be convicted of a specific offense because of his other misconduct or his general bad reputation.

Testimony must be by percipient witnesses, and hearsay, conclusions, and personal opinions are excluded.

In this case, the prosecutor used a clever, though not novel, procedure. Each witness was called to testify against a specific, named defendant, "reserving the right to offer his testimony against other defendants." [R. 580, lines 9 to 23.]

Each defendant's counsel was permitted to cross-examine, but such opportunity presented a dilemma: where a witness was called against defendant *A*, then *B*'s counsel could decline to cross-examine, but if the prosecution later offered the testimony by motion against *B*, it would be claimed that *B*'s counsel had waived his right of confrontation and cross-examination.

It would seem that a more proper procedure would be for the prosecutor to offer the testimony against all defendants whom he honestly believed it to involve, *subject to a motion to strike if it were not later connected up*. Then, each defendant would know where he stood.

The gist of this exception, of course, is that this mass of testimony was not connected up to these appellants. No conspiracy was proved, which could render each conspirator liable for the actions of the others. No common scheme was shown, and even if such a scheme were shown it would not render such evidence proper without a showing of conspiracy, agency or some connecting link.

The prosecutor's motion to obtain this all-inclusive order, came on June 17, 1948, after over six weeks of trial. [R. 3536, lines 16-23; R. 3537.] It is humanly impossible for anyone to recall and weigh fairly all the testimony of such a period, and the trial judge frequently referred disputes about prior testimony to the jury's memory.

The difficulty of a long trial is recognized in the important case of *U. S. A. v. Corlin* (D. C. Calif. 1942), 44 Fed. Supp. 940, at 949:

"The arduous task imposed upon me by the trial
* * * of three weeks, * * *. And * * *
after a thorough consideration of all the evidence
* * * I am of the view that the Government has
failed to prove, beyond a reasonable doubt, that any
of the defendants is guilty * * *."

If a learned trial judge like the Honorable Leon R. Yankwich must frankly confess such difficulty in a three weeks' trial, how much actual memory can be expected of an inexperienced body of jurors?

This objection is closely related to the *mass trial* error, and serves to emphasize the essentially un-American and unfair nature of the long-drawn-out trial.

One defendant is criminally liable as principal for the acts of another as his agent, only if he “knowingly and intentionally aids, advises or encourages the criminal act committed by the agent.”

U. S. A. v. Corlin (D. C. S. D. Calif. 1942), 44 Fed. Supp. 940, 946.

Here, there was not one scintilla of evidence to connect these appellants “knowingly and intentionally,” or at all, with the mass of testimony relating to the allegedly criminal conduct of their co-defendants.

Under the circumstances, therefore, the learned trial judge committed prejudicial misconduct in granting the prosecution motion and so informing the jury [R. 3537 and 3558 to 3561] and leading the jury to believe that a conspiracy had been legally proved, binding each appellant for the acts of his co-defendants. *The impact of such a sweeping order could not fail to impress the minds of non-lawyers*, particularly where the trial court was obviously misled as to the legal principles at stake.

To hold such an order non-prejudicial would, in effect, establish a dangerous precedent, allowing a defendant to be tried, not only on the evidence against himself but likewise on the totally incompetent-for-any-purpose evidence of a vast array of witnesses called and examined in such fashion as to render the trial both interminable and intolerable.

The Supreme Court has recently opined that evidence improperly admitted is prejudicial even where it is “doubtful” whether the jury were affected.

Blumenthal v. U. S. A. (1947), 335 U. S., 68 S. Ct. 248, 92 L. Ed. (A. O.) 183, at 190.

THE HAUPT CASE.

The Court's attention is called to the *Haupt* case, in which six defendants were tried for forty-one alleged overt acts of treason, not all of which overt acts were proved to have been participated in by each defendant. Much of the evidence was such that a jury would have difficulty in limiting it to the individual defendants to whom it had been connected up with sound proof, especially, for example, alleged incriminating statements of individuals. The Court said, with reference to background evidence as to some defendants:

"We seriously doubt, however, if it was possible for the jury to limit its damaging effect to the particular defendant against whom it was admitted."

U. S. A. v. Haupt (C. C. A. 7th 1943), 136 F. 2d 661.

THE CANELLA CASE.

Almost on all fours is the case of *Canella v. U. S. A.* (C. C. A. 9th 1946), 157 F. 2d 470, which, relying on the *Kotteakos* case, held that *introduction of all the evidence* as against all defendants, on the single conspiracy theory, was error, when the evidence clearly showed no such conspiracy but only many separate transactions.

In another case, the Court pointed out that the only practical method to avoid the dilemma of evidence admissible against one defendant but incompetent and prejudicial to others is by separate trials.

U. S. A. v. Rose (D. C. 1940), 31 Fed. Supp. 249.

MISCARRIAGE OF JUSTICE.

In this connection it is well to bear in mind that serious error is regarded as prejudicial unless the evidence of guilt is overwhelming.

Fiswick v. U. S. A. (1946), 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196;

Commonwealth v. Blose (1947), 60 Pa. Super. 165, 50 A. 2d 744 (cites *Kotteakos* case).

DUE PROCESS.

The right to be protected from the hazard of conviction in a mass trial, as a result of evidence properly admissible only as to co-defendants, is within the scope of the due process clause of the Constitution.

Brooks v. U. S. A. (C. C. A. 5th 1947), 164 F. 2d 142.

SUMMARY.

The evidence admitted *en masse* by the blanket order of the Court was obviously incompetent and without foundation on the agency or conspiracy theories. Its prejudicial effect was such as to destroy all semblance of a fair trial within the meaning of the due process clause. The *Haupt* case establishes the inability of the jury to make differentiations which the trial judge failed to comprehend. Reversal and new, separate trials are required.

IV.

Insufficiency of the Evidence to Prove a Scheme.

Appellants urge that the evidence is wholly insufficient as to the counts of the indictment of which they were convicted for the following reasons:

Appellant Henson had no experience with vending machines [R. 5439], and answered an ad of defendant, Earl H. Rhodes, to invest in machines himself [R. 5404] and thereby met defendant Earl H. Rhodes for the first time. [R. 5404, 5323, 5436.] At that time [approximately November, 1945, R. 5436], appellant Henson was a traveling salesman, selling a book entitled "Thunder God's Gold." [Exhibit N-4, R. 5393.]

Appellant Henson saw Earl H. Rhodes only twice. [R. 5404, 5407.] Henson first investigated Rhodes by checking his references, to-wit: Dunn and Bradstreet and Security-First National Bank in Los Angeles. [R. 406, 415.] Both gave defendant Rhodes a good credit rating. [R. 5405 and 5406.] Appellant Henson went home and talked it over with his wife; the following day, Henson went out with a locator of defendant Rhodes to personally satisfy himself of the possibility of getting locations for vending machines. In three-hours' time, the locator got 40 locations. [R. 5407.] Following that, appellant Henson signed a Distributor's Sales Contract [Exhibit K-4] and became one of 70 or more distributors. [R. 207.] Appellant Henson then undertook selling the vending machines as an incident to selling his book "Thunder God's Gold." [R. 5410.]

Appellant Henson was interviewed by a postal inspector in Seattle, Washington, and made a full, fair and complete disclosure of all of his activities for two hours, and the postal inspector told him, in substance, that so far

as he was personally concerned, he could see nothing wrong with what appellant Henson was doing. This was not denied. [R. 5469, Exhibit 154.] Henson gave the postal inspector a list of persons whom he had sold in Seattle November 21, 1945.

Subsequent to the indictment, appellant Henson again made a full, fair and complete disclosure to J. H. Van Meter, and inquired if he had done anything wrong, and was led to believe that his matter might or would be dismissed, but it never was. [R. 5426 and 5428.]

Appellant Henson attended no meetings with distributors; the record shows there were none. [R. 4334.] Likewise, there was no correspondence between distributors or manufacturer (defendant Rhodes) as to activities of distributors. [R. 435, 437.]

Appellant Henson had never seen or met any of the co-defendants, including appellant Bridgman [R. 6308], prior to attending the trial in the Federal Court, except:

- a. Defendant Earl H. Rhodes, whom he met twice, and
- b. Defendant Ernest R. Alexander, who saw him once in the office. Alexander was acquitted.

As further evidence of good faith, appellant Henson had no complaints about the glass in vending machines sold by him because he had cemented the glass in the vending machines together with glass cement [R. 5413], and successfully and satisfactorily demonstrated his machines to customer Henry B. Wiesley, by rolling them on a bed. [R. 5384, 5413.]

Relative to the credibility to be given two witnesses who testified against appellant Henson, Henry B. Wiesley [R. 1809] identified appellant Ernest H. Bridgman as Jay C. Henson [R. 1809, 1810] and later admitted [R.

1852] that he had never seen appellant Bridgman before and had made a mistake. Mr. Wiesley, when asked by counsel for the Government at the conclusion of his testimony, was still unable to identify appellant Henson. [R. 1872.] The witness Wiesley told defendant, Ernest R. Alexander, in the hall that the reason he could not remember was because he had been drinking at the time. [R. 5231, 5232.] This was not denied. Both Mrs. Henson and appellant Henson testified that Mr. Wiesley had brought a bottle of whiskey to the room. [R. 5382.]

Witness Henry B. Wiesley's original complaint was slow deliveries [R. 1864, Exhibit 77], and witness Lawrence H. Liebrand's original complaint was set forth in the following Exhibit WW [R. 1958, 1974]:

"Gentlemen: I got my machines in fine shape but cannot place them in the places Mr. Henson contracted for as practically all of those places have machines which were put in from the time Mr. Henson was there till the time the machines arrived.

"P. S. Do you make a slug ejector and a small bracket for your machine."

Mr. Liebrand had never seen appellant Henson in his life before [R. 1892] and could not say whether or not the signature was Henson's.

Exhibit A (Distributor's Agreement), typical of the contract which each defendant distributor had with defendant, Earl H. Rhodes, was the only agreement in existence. [R. 265, 267.]

Defendant Rhodes was the sole owner of the vending machine manufacturing business and employed David McFarland (Government witness) as bookkeeper. [R. 70.] McFarland took all directions and instructions from

Rhodes. [R. 84.] McFarland saw appellant Henson but once. [R. 87.]

As further evidence of good faith, Henson was still sold on the machines because they had worked as well as any he had ever seen. He did not know of a single failure. [R. 5430.]

Twenty-three thousand one-cent machines were sold by Rhodes, the manufacturer [R. 377], and twelve thousand five-cent machines. [R. 377.] McFarland testified approximately two hundred complaints were received. [R. 377.] McFarland answered complaints but first, defendant Rhodes told McFarland what answers were, and McFarland used that as basis for replies. [R. 377.] Five per cent of complaints concerned nuts gumming up in the machines; fifty per cent were because of slow deliveries; forty-five per cent were due to some defect or improper operation. [R. 422.] The percentage of complaints was about ten per cent.

McFarland testified that any defective machines, or any and all defective machines returned, were fixed by defendant Rhodes. [R. 380.]

As further evidence of good faith, Gordon B. Mansfield, an inspector, testified the machines were precision-built in that class of sandcasting; that the Government's Exhibit 50 was not a fair exhibit. It would not pass inspection because the base was ground (irregular), defective, warped; the coin mechanism was fractured; the corner of the top had been sawed off; the glass chipped; the lock loose, and was not a fair sample.

Inspector William K. Lawrence [R. 4010] testified that ten per cent of the machines were rejected for defects at the factory.

Melvin Christiansen, a tool and die worker, testified that defendant Rhodes spent \$8,100.00 with him [R. 4052], and that the vending machines were 90 per cent foolproof and "as good as we could build"; that Exhibit 109-F was precision-made as near as possible to production standards.

Horace J. Burrow [R. 4192], a wood and metal pattern man for 48½ years, testified the machines were precision-built to withstand the purposes for which they were built; that defendant Rhodes had spent \$2,800.00 with Burrow; that defendant Rhodes had spent \$9,500.00 on testing the 5 and 1¢ machines.

Appellant Bridgman rented space from the Los Angeles Manufacturers under a distribution agreement. [R. 96.] McFarland received checks from Bridgman for rent. [R. 96.] Each distributor had an agreement with Los Angeles Manufacturers (Earl H. Rhodes) permitting him to sell vending machines and to purchase them from the manufacturer at an agreed price. [R. 205, 207.] Distributors were procured by advertisements in the paper by defendant Rhodes. [R. 214.]

Appellant Bridgman paid a monthly rental for his office space, kept separate books, employed his own help, and operated as an individual concern, the Bridgman Distributing Company. [R. 229, 230.]

Defendant Earl H. Rhodes carried no social security or withholding taxes on any distributor. [R. 239, 241.] The distributors traveled and the expenses were borne by themselves [R. 240].

The only thing a distributor received was the difference between the purchase price and the amount he paid for the machine. [R. 241.] All distributors, including appellants, operated under the same kind of contract. [R. 242.]

As further evidence of good faith, the manufacturers, Earl H. Rhodes, had considerable difficulty getting material [R. 441], particularly metal. [R. 442, 449.]

According to the record and the testimony, with reference to sales, they were all individual, separate sales and transactions unrelated to each other by individual distributors who had only contact with one central figure, Earl H. Rhodes. As mentioned in the *Corlin* case, there is no connecting link between the hub of a theoretical wheel, in the person of Mr. Rhodes, who was not convicted, and a rim connecting the distributors with each other. If the distributors were conceivably spokes in a wagon wheel there is no evidence of a rim to connect the spokes with a central hub figure, defendant Earl H. Rhodes.

Appellants respectfully point out the complete absence of evidence to connect up the 24 witnesses for the Government as against appellant Henson, when only four testified concerning him; likewise, against appellant Ernest H. Bridgman, when only five testified concerning him. David McFarland was one and testified that he saw appellant Henson only once. [R. 385.]

On the Government's theory of a single scheme, the defendant are likened to cars in a train with defendant Earl H. Rhodes as the engineer, but as pointed out, there is a total absence of any connecting link, acquaintanceship or knowledge of one car (distributor) with the other—the result being that, analyzed properly, it is nothing more than a series of individual transactions where the facts and the circumstances vary materially, all of which have erroneously been introduced concerning or as against all nine defendants.

V.

**Prejudicial Misconduct of the Court Requires
Reversal.**

The Court refused to instruct the jury that the counsel for appellant Bridgman had a right to cross-examine a witness called by the co-defendant Rhodes. [R. 3907, lines 1-10.]

Clearly the right to such cross-examination existed and should have been fully permitted. The Court, in fairness to defendants, should have made it clear that the co-defendants were not bound by the testimony of any witness called on behalf of any individual defendant, and that a right to cross-examine existed. Elemental fairness as well as adequate exercise of the cross-examiner's right so required.

No basis is perceived upon which the trial court could claim the right to refuse such a charge, in the exercise of its discretion.

The right of cross-examination is of the quintessence of due process of law in our system. Any such substantial abridgment of the age-old privilege is in and of itself highly prejudicial.

Undoubtedly, counsel for appellant did have the right to cross-examine the witness called by another defendant, since Bridgman and Rhodes were "adverse parties" rather than parties "united in interest."

Estate of Kasson (1900), 127 Cal. 496, 59 Pac. 950.

A natural corollary to such right is the right to have the jury know of the "limited effect" of anything brought out on cross-examination, *i. e.*, to know that a co-defendant may question the witness, as of right, without being bound by the testimony in the sense that such testimony binds the defendant who calls the witness. Refusal of the Court to so inform the jury is error and misconduct.

The refusal of this instruction is regarded as analogous, and indeed very close, to the more common situation where evidence is admitted for a limited purpose, *e. g.*, impeachment. In such cases it is uniformly established that the Court's refusal to instruct the jury that the evidence has only a limited purpose and effect is error.

Adkins v. Brett (1920), 184 Cal. 252, 258, 193 Pac. 251;

People v. Peck (1919), 43 Cal. App. 638, 648, 185 Pac. 881;

People v. Corey (1908), 8 Cal. App. 720, 97 Pac. 907.

VI.

Prejudicial Error Occurred in Limitation of Appellants' Right of Cross-Examination.

No right is more precious in a criminal proceeding than the right to cross-examine the witnesses with whom the accused is confronted, to test their stories, and to draw out testimony placing the defendant in a more favorable light. This is doubly true where from the testimony the jury must determine whether the defendants were dealing in good faith or pursuant to a fraudulent scheme.

In the cross-examination of David H. McFarland, the Court arbitrarily refused to allow questions to explain the complaints about delays in filling orders by proof that a shortage of materials developed and that defendants made strenuous effort to supply customers. [R. 441, lines 11-25; 442, lines 8-25; 444, lines 3-25; 447, lines 18-25; 448, line 1, through 449, line 22.]

The rule is well established that limitation of the right of cross-examination—even on such a comparatively unimportant point as whether a witness may be biased by reason of being in official custody—is reversible error. In the leading case of *Alford v. U. S. A.* (1931), 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77, Mr. Justice Stone, speaking for the unanimous Court and reversing a conviction of mail fraud because objection was sustained to a single question, stated:

“It is the essence of a fair trial that a reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.”

Accord:

Hanger Inc. v. U. S. A. (App., D. C., 1947), 160
F. 2d 8;

People v. Westlake (1899), 124 Cal. 452, 57 Pac.
465;

People v. Pantages (1931), 212 Cal. 237, 297 Pac.
890.

The reason that limitation of this basic procedural step is regarded as in itself a miscarriage of justice is that it is the chief defensive weapon to test the intelligence, memory, impartiality, veracity and integrity of adverse witnesses.

The Ottawa (1866), 3 Wall. 268, 18 L. Ed. 165.

Hence, the courts say it is an absolute right, not a mere privilege which the trial court may tamper with in the exercise of a sound discretion.

Gallaghan v. U. S. A. (C. C. A. 8th, 1924), 299
Fed. 172;

Kirk v. U. S. A. (C. C. A. 8th, 1922), 280 Fed.
506;

York v. U. S. A. (C. C. A. 6th, 1924), 299 Fed.
778;

Haussener v. U. S. A. (C. C. A. 8th, 1925), 4 F.
2d 884.

Conclusion.

Appellants respectfully submit, therefore, that the interests of substantial justice may best be served by reversing the judgments of conviction herein, on all the grounds stated in this brief, and by returning the matter for a new trial in accordance with the standards set by the due process clause of the Constitution.

Respectfully submitted,

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No. 12028

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST H. BRIDGMAN and JAY C. HENSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

JUL 20 1949

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APPELLEE'S BRIEF.

Jurisdiction.

Appellants, together with twenty-five other defendants, were indicted under Title 18, United States Code, Sec. 338 (Mail Fraud). The District Court had jurisdiction under Section 128 of the Judicial Code, as amended, U. S. C. A., Title 28, Chapter 6, Section 225a. The offenses charged were committed in the Southern District of California. Judgments were entered on the 7th day of August, 1948 [T. R. 56, 58]. Notice of appeal was filed on the 25th day of of August, 1948 [T. R. 82] on behalf of appellant Ernest H. Bridgman and on 27th day of August, 1948, on behalf of appellant Jay C. Henson.

The references preceded by the symbols are as follows: "T. R.," Clerk's Transcript; "R.," Reporter's Transcript; "A. B.," Appellant's Brief on Appeal.

Statute Involved.

Title 18, United States Code, Section 338:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both.”

Statement of the Case.

An indictment was returned on the 25th day of June, 1947 [T. R. 1] charging appellants and others with violation of Title 18, United States Code, Section 338. The indictment charged the defendants with devising a single scheme, specifying eighteen overt acts, in separate counts, and using the United States mails to defraud [T. R. 1-21]. At the conclusion of the Government's case the Court dismissed all counts of the indictment except Counts 3, 4, 7, 14 and 17 [T. R. 49; R. 3537-38]; and at the close of the case the jury found the defendants Ernest R. Alexander [T. R. 55], Robert M. Johnson [T. R. 59], A. W. Wilson [T. R. 63] and George M. Carner [T. R. 57] not guilty on all five counts. They were unable to arrive at a verdict as to Earl H. Rhodes, Richard L. Sippel, and Ray F. Martin. Appellants Ernest H. Bridgman was found guilty on Count Four [T. R. 56], and Jay C. Henson was found guilty on Count Seven [T. R. 58], and both were each acquitted of four of the remaining counts of the indictment. After denying motions for acquittal and a new trial [T. R. 75], the Trial Judge on the 23rd day of August, 1948 [T. R. 77-78a], sentenced each for a term of thirty months and a fine of \$1,000, and both Ernest H. Bridgman and Jay C. Henson are now presenting a joint appeal [T. R. 79-83].

Statement of Facts.

The uncontradicted evidence taken at the time of trial shows that the defendant Earl H. Rhodes was the sole owner of the Los Angeles Manufacturers [R. 4377, Gov. Ex. 41], which manufactured and sold the Star One Cent and Sun Five Cent peanut vending machines. The defendant Rhodes devised the plan and scheme to distribute these vending machines not through vending machine jobbers but so-called "distributors." The appellants Bridgman and Henson were such distributors. Rhodes prepared the advertising literature, profit schedules, brochures [Gov. Exs. 1 and 2], sample newspaper advertisements [Gov. Exs. 29 and 32], letters of identification [Gov. Ex. 3, R. 146, 148], sales kit material [R. 189, 4400, Gov. Exs. 27 to 37, incl.; Defts. Exs. F, G, H, I, L, M, N]. The fraudulent representations devised by Rhodes were: the vending machines were backed by many years of experience; that proven routes were established and the purchaser would have exclusive territories; the vending machines were favorably known to stores everywhere and were in general demand; no experience was required to successfully operate a route of machines; no financial risk involved; each purchaser would be assisted in inaugurating his business; each one cent machine would earn an average net monthly income of from \$2.88 to \$6.48 and each five cent machine would earn an average net monthly income of from \$8.00 to \$30.00; the machines were precision built and one hundred per cent foolproof with nothing to get out of order with no gears or wheels requiring adjustment; the machines were a result of many years of experimentation, study and experience; the five cent machine was equipped with a highly perfected and efficient device for ejecting slugs and other

articles besides money [Gov. Exs. 1 and 2]. He exercised control over the distributors, requiring that all new literature be submitted to him for approval [Gov. Ex. 33, R. 4477]. He furnished an outline of the sales talk [Gov. Ex. 27] and instructions to salesmen [Defts. Exs. N and YYY, R. 5444-48]. He further continued to supervise the distribution and sale of the vending machines by dividing the United States into four separate territories with a sales supervisor over each territory [Deft. Ex. P]. He also required the so-called distributor to collect 50% of the purchase price of the sale and requested that the check or money order be made payable to the Los Angeles Manufacturers. The balance of the purchase price was collected by the Los Angeles Manufacturers upon delivery of the machines to the customer, and the so-called distributors' commissions were paid by check of the Los Angeles Manufacturers [R. 111, 112, 115, 116], but not in full until final collection had been made [R. 238].¹

None of the sales literature prepared by Rhodes was based on actual experience [R. 4478, 4479, 4480]. Neither did the appellants Bridgman or Henson base any of their representations which they made to their prospective customers on any actual experience [R. 5447, 5448, 5451, 5452, 5461, 5477, 6266, 6267, 6282]. They followed the same pattern and technique of selling outlined by Rhodes. They placed ads in newspapers intending to convey the idea that an established vending machine route was for sale [R. 1796, 1797, 1804 to 1809, 1975, 1976, 2240, 2962, 2971, 6233, 6258; Gov. Exs. 10, 11, 25, 74B and C, 113, 129,

¹Distributor's Bulletin, Ex. 31, covers the payment of commissions.

162]. This was the bait used to get direct contact with the prospect. Then they made the representations contained in the One and Five Cent folders [Gov. Exs. 1 and 2, 74B and C; R. 6262-65], and the profit schedules [Gov. Exs. 4 and 5, 74A, 79; R. 2248-2251, 2257, 3002, 3004, 3007, 3021, 3026, 3032, 6262-65], knowing them to be false and for the purpose of deceiving and cheating their prospective customers.

Each of the letters set forth in the respective counts in the indictment were admittedly caused to be mailed by the defendants, and each defendant had knowledge of the method of the business and each defendant used the mails in the conduct of the business [Gov. Exs. 10, 11, 25, 74A, 74B, 76, 77, 79A, 79B, 79C, 80, 81, 116, 118, 120, 151; R. 1893, 1900, 1901, 1904, 5455]. They were aware that the mails were being used by persons replying to the newspaper ads as one of the first steps in the scheme and that Rhodes would acknowledge receipt by mail of the order procured by them [R. 118, 119, 136]. They also knew that in order to complete the transaction a sight bill of lading would be sent through the mails when shipment was made by Los Angeles Manufacturers of the vending machines to the customer [Gov. Ex. 84].

Each of the appellants knew that the representations made by him were untrue and false [R. 6268-70, 81, 82] and with knowledge of this they nevertheless sold and collected from a large number of persons [R. 5454, 6290], including those named in the indictment, a sum of money amounting to many thousands of dollars.

ARGUMENT.

We shall answer the contentions made by the appellants point by point. The appellants have selected a few abstract propositions without pointing out in their brief or even stating reasons in support of these particular contentions. We see no point in discussing them in detail. Suffice it to say that as to each unargued specification of error there is no merit and none of them should be entertained by this Court as a ground for reversal. We will confine ourselves in this argument, therefore, to the issues presented by appellants.

Point I.

The statute permits inconsistent verdicts. 18 U. S. C. 566:

“On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those on whom they do agree, on which a judgment shall be entered accordingly, and the cause as to other defendants may be tried by another jury.”

It is well established since 1932 that a logical inconsistency is no basis for reversing a conviction; the jury is the sole judge of the facts and will not be disturbed because a co-defendant was acquitted. In an opinion by Justice Holmes, *Dunn v. United States*, 284 U. S. 390 (1932), at pages 393-394, it is said:

“Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham v. The Queen*, 5 Best & Smith, 635, 642, 643. *Sekvester v. United States*, 170 U. S. 262. If separate indictments had been

presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler v. United States*, 7 F. (2d) 59, 60:

“The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.’ * * *

“That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible but verdicts cannot be upset by speculation and inquiry into such matters.”

Since the *Dunn* case, the Supreme Court has had the problem before it on other occasions of which the views expressed by Mr. Justice Holmes were reiterated.

Borum v. United States, 284 U. S. 596;

United States v. Dotterweich, 320 U. S. 277, 279.

Other cases in point are:

American Medical Ass’n v. U. S., 130 F. 2d 233,
252 Aff’d 317 U. S. 519;

Suetter v. United States, 140 F. 2d 103 (C. C. A. 9);

Muench, et al. v. United States, 96 F. 2d 332, 336
(C. C. A. 8);

Macklin v. United States, 79 F. 2d 756 (C. C. A. 9);

Sasser v. United States, 29 F. 2d 76 (C. C. A. 5),
cert. den. 279 U. S. 836.

The case of *Macklin v. United States*, 79 F. 2d 756, 758 (C. C. A. 9), has followed the ruling in the *Dunn* case, and where it is said:

“The verdicts are not inconsistent, but had they been so, that fact, standing alone, would not render the verdict of guilty under the first count invalid. This court said, in *Bilboa et al., v. U. S.*, 287 F. 125, 127: ‘It was the duty of the jury to return a verdict upon each count of the indictment, and the fact that it found the defendants not guilty on one count does not render conviction in the other invalid.’ And the Second Circuit has said, in *Seiden v. U. S.* (C. C. A.), 16 F. (2d) 197, 198: ‘We have held that, when a jury convicts upon one count and acquits upon another the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions.’”

The appellants have cited the case of *Speiller v. United States*, 31 F. 2d 682 (C. C. A. 3), which is no longer the law and is commented upon in *Pilgreen v. United States*, 157 F. 2d 427, 428 (C. C. A. 8), as follows:

“Appellant relies upon cases decided prior to 1932, such as *Speiller v. U. S.*, 3 Cir., 31 F. 2d 682, and *Boyle v. U. S.*, 8 Cir., 22 F. 2d 547. The teaching of the cases relied upon by appellant is not now the law in the federal courts. Consistency in the verdict of a jury is not necessary. Where different offenses are separately charged in the counts of a single indict-

ment and the same evidence is offered in support of each, an acquittal on one count can not be pleaded as *res judicata* of the others. *Dunn v. U. S.*, 1932, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161; *U. S. v. Dotterweich*, 320 U. S. 277, 279, 64 S. Ct. 134, 88 L. Ed. 48; *Foshay v. United States*, 8 Cir., 68 F. 2d 205; *Audett v. United States*, 8 Cir., 132 F. 2d 528; *Stein v. United States*, 9 Cir., 153 F. 2d 737, 744; *United States v. Hare*, 7 Cir., 153 F. 2d 816, 819."

In the case of *Downing v. United States*, 157 F. 2d 738 (C. C. A. 8), further comment is made upon the decisions of the courts prior to the *Dunn* case, and says at page 739:

"Prior to *Dunn v. United States*, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356, 80 A. L. R. 161, there had been a conflict in the federal courts on whether an inconsistent verdict on the separate counts of an indictment could support a criminal sentence. The *Dunn* case settled the question, however, when the Supreme Court refused to reverse a conviction for inconsistency in verdict on the separate counts of an indictment, involving the same evidence, and said, 284 U. S. at page 393, 52 S. Ct. at page 190: 'Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. * * * If separate indictments had been presented against the defendant for possession [of intoxicating liquor] and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.' "

The cases relied upon by appellants are not applicable for none of them involve the same factual situation as the instant case. They are cases involving a factual situation in which the same offense is charged in two or more counts or several separate conspiracies were consolidated. Contrasting the facts of the case on appeal with the circumstances cited in appellants' brief, it is readily seen that none of the cases cited are in point.

In *Mitchell v. United States*, 142 F. 2d 480 (C. C. A. 10), the court held that where there was a continuing scheme, but separate uses of the mails, a conviction on each separate use of the mails would support separate sentences under the law.

The facts of *Sasser v. United States*, 29 F. 2d 76 (C. C. A. 5), are analogous to those in this appeal. The defendants were charged in twenty counts with violation of the same statute as the appellants, to-wit: mail fraud, 18 U. S. C. A. 338. The defendant Sasser was convicted on Counts 1 and 5, defendant Baker on Counts 5 and 7, defendant Adams on Counts 1 and 20, and defendant Russell on Counts 8 and 16. The court commented at page 78 as follows:

"As already stated the existence of the scheme was not seriously in dispute and there was abundant evidence to show the guilty connection of each defendant with it. Adams signed the letter set out in the first count. It was not shown that Russell signed any of the letters, but if he was a party to the scheme, it was immaterial that the letters were signed and mailed by the other defendants. Partnership in crime

being established against all of the defendants, the act of any defendant in furtherance of the common criminal plan was the act of all. *Davis v. U. S. (C. C. A.)*, 12 F. 2d 253.”

In the case of *Hare v. United States*, 153 F. 2d 816 (C. C. A. 7), cert. den. 328 U. S. 836, the court said the inquiry is over the sufficiency of the evidence to support the verdict of guilt as to the co-defendant and that the court looks to evidence to determine the guilt of an accused person, not to the verdict as to the guilt of another.

See also:

Chiaravalloti v. United States, 60 F. 2d 192 (C. C. A. 7).

Point II.

Appellants contend that a mass trial is unconstitutional and a prejudicial misjoinder which requires reversal of judgment, and admit that no direct authority has been found establishing a rule that it is unconstitutional or reversal error to conduct a trial for 59 days (A. B. p. 15). They rest their argument upon the premises that the defendants are entitled to a speedy trial. Under the Sixth Amendment to the Constitution the provision relating to a speedy trial was intended to prevent the oppression of citizens by holding criminal prosecutions suspended over them for an indefinite time, and to prevent delays in the administration of justice by imposing upon judicial tribunals an obligation to proceed with reasonable dispatch in the trial of criminal accusations. So far as the conduct of a trial is concerned, all that is required is that it be conducted according to fixed rules, regulations and pro-

ceedings of law, free from vexations, capricious and oppressive delays.

See, *e. g.*:

Daniels, et al. v. United States, 17 F. 2d 339 (C. C. A. 9), cert. den. 274 U. S. 744;

Shepherd v. United States, 163 F. 2d 974 (C. C. A. 8);

United States v. Holmes, 168 F. 2d 888 (C. C. A. 3).

All matters touching the proper, orderly and speedy trial, conduct of a trial, rests in the sound discretion of the trial court.

Adler v. United States, 182 Fed. 464, 472 (C. C. A. 5).

The appellants have failed to show any prejudice.

See, *e. g.*:

Collins, et al. v. United States, 157 F. 2d 409, cert. den. 315 U. S. 860 (C. C. A. 9).

We find nothing in the record to indicate that the sound discretion exercised by the Trial Judge in attempting to expedite the trial and prevent delays was abused and abuse of discretion will never be presumed.

The *Kotteakos* case, 328 U. S. 750, relied upon by the appellants, does not support their contention that appellants were denied a fair trial because several defendants charged under the mail fraud statute were tried jointly but on the contrary states at page 773:

“There are times when of necessity, because of the nature and scope of the particular federation, large

numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct."

The decision in *Kotteakos v. United States* must be distinguished from the later case of *Blumenthal v. United States*, 322 U. S. 539, both decisions having been written by Justice Rutledge. In the *Kotteakos* case the Government, at page 752, admitted they had not proved one conspiracy but eight or more different ones of the same sort executed through a common key figure. The fraudulent applications for loans were made for different and independent people connected by the circumstances that the various loans were arranged by the same individual, and the court pointed out in the *Blumenthal* case at page 558 that it was very different from the facts admitted to exist in the *Kotteakos* case:

"Apart from the much larger number of agreements there involved no two of those agreements were tied together as stages in the formation of a larger all inclusive combination all directed to achieving a single unlawful end or result.

"On the contrary, each separate agreement had its own distinct illegal end. Each loan was an end in itself, separate from all others although all were alike in having similar illegal objects * * * (p. 559). Here the contrary is true. All knew of and joined in the overriding scheme. All intended to aid the owner of the Francisco or another to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact

limits, saw a common end to aid in disposing of the whiskey. True, each salesman aided in selling only his part but he knew the lot to be sold was larger and thus he was aiding in a larger plan. We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy in which the several agreements were essential and integral steps, * * *

The facts in the case before the Court are analogous to those in the *Blumenthal* case. Each of the appellants knew that when he joined the scheme the part he was playing in carrying out the plan was devised by Rhodes. Both intended by selling vending machines to aid and assist Rhodes in carrying out his scheme. It is not essential that each member of the scheme know and come in direct contact with all the other members in relation to the scheme. Neither is it required that each participate in or have knowledge of all operations of the scheme. It suffices if a conspiracy is formed and several persons knowingly contribute their efforts. The essence of the crime charged in the substantive counts on which appellants were found guilty is the scheme to defraud and the use of the mails in furtherance of it. In *Pietch*, 110 F. 2d 817, 821, cert. den. 310 U. S. 648, it is said:

“Whether such scheme was formed may be established by facts and circumstances and the reasonable inferences and deductions which fairly may be drawn from them. * * * It is not essential to constitute the offense that the agreement be in any specified form or that any particular words be used. It is enough if the minds of the parties meet and unit in an understanding way to accomplish the common purpose.”

Also:

Berenbeim v. United States, 164 F. 2d 679, 683, 684 (C. C. A. 10), cert. den. 333 U. S. 827;

Kaufman v. United States, 163 F. 2d 404, 411 (C. C. A. 6), cert. den. 333 U. S. 857;

Baker v. United States, 156 F. 2d 386, 391 (C. C. A. 5), cert. den. 329 U. S. 763;

United States v. Manton, 107 F. 2d 834, 848 (C. C. A. 2), cert. den. 309 U. S. 604;

Booth v. United States, 57 F. 2d 192 (C. C. A. 10).

Point III.

The Court properly granted the Government's motion admitting all the evidence against all defendants with the exception of portions of the testimony of the witness Van Meter [T. R. 48]. The procedure followed by the Trial Court below admitting the testimony of each witness against only a particular defendant with whom he dealt, and awaiting the motion of the Government at the close of its case to admit all of the testimony against all of the defendants upon the ground that a scheme had been then established among all of them, was approved in the *Blumenthal* case, 332 U. S. 539. It is the appellant's contention that since this evidence as admitted was limited to one or the other of the defendants that they were deprived of the right of cross-examination. They argue that they could not fully cross-examine the Government witnesses at the time of the original limited admission of the testimony. The record in this case does not support this

contention; they were given full opportunity to cross-examine each Government witness. At the time of the granting of the Government's motion to admit all evidence against all defendants, there was ample proof of the existing scheme. The evidence sufficiently showed a concert and privity among the defendants. In a scheme to defraud under the mail fraud statute it is not necessary to show any formal agreement, for the agreement may be shown "if there be concert of action, all of the parties working together understandingly with a single design for the accomplishment of a common purpose."

United States v. O'Connell, 165 F. 2d 697, 699 (C. C. A. 2, 1948); cert. den. 333 U. S. 864.

In the case of *Robertson v. United States*, 33 F. 2d 238 (C. C. A. 9), the Court says at page 240:

"Furthermore, a scheme to defraud when shared in by several, becomes a conspiracy, and if a conspiracy exists in fact, the rules of evidence are the same as where a conspiracy is charged."

The acts of one of several participants in a mail fraud scheme in furtherance of a common criminal enterprise are in law the acts of all.

Thus in *Bogy v. United States*, 96 F. 2d 734 (C. C. A. 6), at page 741, the Court said:

"It need hardly be repeated that all who with criminal intent join themselves even slightly to the principal scheme, are subject to the statute, although they were not parties to the scheme at its inception

(Kaplan v. U. S., 2 Cir., 18 F. 2d 939), the acts of one in furtherance of a common criminal enterprise being in law the acts of all. Sasser v. United States, 5 Cir., 29 F. 2d 76; Belt v. United States, 5 Cir., 73 F. 2d 888.”

As was said in *American Tobacco Co. v. United States* (C. C. A. 6), 147 F. 2d 93, 107, aff'd 328 U. S. 781:

“It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the same unlawful result. U. S. v. Harrison, 3 Cir., 121 F. 2d 930; Allen v. U. S., 7 Cir., 4 F. 2d 688. Often, if not generally, direct proof of a criminal conspiracy is not available, and the common purpose and plan are disclosed only by a development and collocation of circumstances.”

and further * * *

“Where the circumstances are such as to warrant the jury in finding that the conspirators had some unity of purpose, or some common design and undertaking, or some meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established, is justified. See Marx v. U. S., 8 Cir., 86 F. 2d 245, 250; Shannabarger v. U. S., 8 Cir., 99 F. 2d 957.”

Point IV.

The appellants assert that the evidence is wholly insufficient as to the counts of the indictment of which they were convicted. It is well settled that the sufficiency of evidence is generally a jury question. Fairly recent cases on this proposition are:

Hemphill v. United States, 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627;

Yoffe v. United States, 153 F. 2d 570 (C. C. A. 1).

It is also established that appellate courts will consider the evidence most favorable to the prosecution and will indulge in all reasonable presumptions in support of trial courts' rulings and draw all inferences permissible from the record whether evidence is sufficient to sustain a conviction.

Henderson v. United States, 143 F. 2d 681 (C. C. A. 9).

There are two elements of the offense: (a) the devising of some scheme or artifice to defraud; and (b) the use of the mails in the execution, or attempted execution thereof, such misuse of the mails being the gist of the offense. The crime is complete when the scheme to defraud is devised and the mails are used to execute it.

Busch v. United States, 52 F. 2d 79 (C. C. A. 8);

Belt v. United States, 73 F. 2d 888 (C. C. A. 5);

Alexander v. United States, 95 F. 2d 873 (C. C. A. 8);

Van Riper v. United States, 13 F. 2d 961 (C. C. A. 2);

Levine v. United States, 79 F. 2d 364 (C. C. A. 9).

and numerous others are authority for the proposition that all who with guilty knowledge join a combination formed for a criminal purpose within the purview of the statute subject themselves to the penalty provided, regardless of their participation or lack of understanding of the scope or membership of the unlawful combination. It is enough that the members agree to execute the criminal purpose and, of course, under the well established rule, the act of one becomes the act of all.

In *Pinkerton v. United States*, 328 U. S. 640, at pages 646, 647, quoting from *Hyde v. United States*, 225 U. S. 347, 369, it is said:

“And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that an overt act of one partner may be the overt act of all without any new agreement specifically directed to that act.” *United States v. Kissel*, 218 U. S. 601, 608.

Page 647:

“Motive or intent may be proved by acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. U. S.*, 163 U. S. 632, 657, 658. A scheme to use the mails to defraud, which is joined in by more than one person is a conspiracy. *Cochran v. United States*, 41 F. 2d 193, 199, 200. Yet all members are responsible though only one did the mailing. *Cochran v. United States*, *supra*; *Mackett v. United States*, 90 F. 2d 462, 464; *Baker v. United States*, 115 F. 2d 533, 540; *Blue v. United States*, 138 F. 2d 351, 359.”

In *Nye-Nissen v. United States*, 168 F. 2d 846, 852, the Court said:

“The existence of a conspiracy may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose. *Blumenthal v. U. S.* (9 C. C. A.), 158 F. 2d 883, Aff’d 332 U. S. 539. Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it. *Myers v. U. S.* (6 C. C. A.), 94 F. 2d 443, cert. den. 304 U. S. 583; *Phelps v. U. S.* (8 C. C. A.), 160 F. 2d 858.”

The appellant Henson contends that because he made a full disclosure to a postal inspector and was told that he could not see anything wrong, it is a complete defense. He further contends that he acted in good faith and had no complaints about the glass in the vending machine sold by him. The courts have said that good faith and honest belief of the truth of the representations made is a complete defense provided the representations do not go beyond such an honest belief and that the honest belief is in actual existence. Where the scheme is based upon false and fraudulent representations, pretenses, and promises made to deceive and defraud, it is not a defense that the perpetrator believed he could make a success of the enterprise or protect the investor against the loss. In other words, he cannot make a wrongful matter right by pointing to the ultimate good intentions.

Foshay v. United States, 68 F. 2d 205 (C. C. A. 8);

Hyney v. United States, 44 F. 2d 134 (C. C. A. 6).

The substance of the testimony of every witness shows that the appellants were following the general course of conduct outlined by Rhodes by making the same representations and using the identical technique by the placing of a false ad in the newspaper, and they continued the fraud by furnishing the prospects with copies of the brochures [Gov. Exs. 1 and 2] and the false profit schedules [Gov. Exs. 4, 5]. They continued the fraud and misrepresentations by leading the purchasers to believe that they would assist them to establish routes.

They also urge it was error to admit evidence of the dealings and transactions of the other co-defendants because they were operating under a distributor's agreement. These distributors' agreements were mere legal fiction² and part and parcel of the over-all scheme to afford Rhodes a certain amount of protection from the misrepresentations which he knew the so-called distributors would make.

The undisputed proof establishes a plan or scheme on the part of the appellants and the use of the mails in the furtherance thereof and that the scheme or plan was put into force and effect with full knowledge on the part of the appellants.

The evidence definitely establishes the appellant Henson's lack of good faith or honest belief in dealing with the particular persons named in the indictment. The record shows that the same letter was sent through the mails, the same financial chart and the same plan as set forth in the indictment. It is well established that the

²Exhibit 75. Business card of Henson states manufacturer's agent.

mailing of the count letter need not have been personally performed by the defendant. The following cases present varying examples of evidence deemed sufficient to meet the requirements of the statute:

Barnard v. United States, 16 F. 2d 451, 453 (C. C. A. 9);

Lonergan v. United States, 95 F. 2d 642, 643 (C. C. A. 9);

Wells v. United States, 9 F. 2d 335 (C. C. A. 9).

Appellate courts are precluded from passing on the weight of the evidence; their duty is to determine whether the jury had the right to pass on what evidence there was.

In *Craig v. United States*, 81 F. 2d 816 (C. C. A. 9), this Court, speaking through Judge Garrecht, stated at page 827:

“Here again we believe that the appellants, despite their correct statement of the rule elsewhere in their brief, have overlooked the true function of this court. To sustain a conviction, we would not be concerned *beyond reasonable doubt* that the defendant is guilty: it is sufficient if there is in the record substantial evidence to sustain the verdict.”

In the face of these decisions we submit that the evidence is sufficient to establish that there was a scheme or artifice to defraud and that in the execution of the scheme the mails were used in the furtherance thereof.

Point V.

The appellants contend that the court refused to instruct the jury to the effect that counsel for appellants had a right to cross-examine a witness called by the co-defendant Rhodes. Reporter's Transcript 3907, cited by appellant Bridgman, does not support this contention. Full cross-examination of all the witnesses was allowed. Under Rule 30, Federal Rules of Criminal Procedure, it is provided:

“No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.”

In *Fredrick v. United States*, 163 F. 2d 536, this court has said at page 549:

“It has long been the settled rule in Federal Courts that an instruction by the court must be excepted to before the case is submitted to the jury in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus obviate the necessity of a new trial.”

The appellate courts do not consider alleged error in instructions unless substantial prejudice has resulted. See *e. g.*, *Monroe v. United States*, 164 F. 2d 471, 474. Neither appellants requested instructions on this point [R.

6495]. The Court's instructions on the law are set forth in the Transcript of Record³ at pages 12-39, and the issues of the propriety and comprehensiveness were submitted without objection [R. 6-8, 50] except as specified [R. 40-50]. Without discussing the Trial Court's instruction in detail, we respectfully submit they amply protected appellants and there was no prejudicial error requiring reversal of the judgment below.

Point VI.

It is appellant Bridgman's contention that he had a right to cross-examine the witnesses called by the co-defendant Rhodes. The record in this case does not support this contention. The appellants were not denied the right of full cross-examination of any witness. The scope, limitation and extent of cross-examination of witnesses in a criminal case rests in the sound discretion of the trial court. (*Madden v. United States*, 20 F. 2d 289, 292 (C. C. A. 9).) It is only in case of a clear abuse of such discretion, resulting in the manifest prejudice to the complaining party that a reviewing court will interfere.

See, *e. g.*:

Brady v. United States, 26 F. 2d 400, cert. den. 278
U. S. 621 (C. C. A. 9);

Glasser v. United States, 315 U. S. 60, 83.

³These references are in the Supplemental Transcript dated August 4, 1948.

In determining whether there was any prejudice suffered by defendant which might affect its substantial rights to justify a reversal of judgment, it is necessary to look at the transaction in connection with the entire record. If from the record the admission of evidence concerning these transactions are not prejudicial, the Appellate Court will not reverse the judgment.

Lewis v. United States, 38 F. 2d 406, 410 (C. C. A. 9):

“Reversal will not result from error, unless from the whole record it appears to be prejudicial.”

The Record before this Court discloses that appellants fully cross-examined the Government witnesses, and their contention in this respect is clearly without merit.

Conclusion.

A study of the record reveals that from the inception of the trial until and including the verdict of the jury appellants were afforded a fair and impartial trial.

In final analysis, the issues involved here are simple and concern only two essential elements:

1. The existence of a scheme to defraud.
2. The placing or causing to be placed in the post office of a letter, postcard, or other mailable matter, for the purpose of executing, or attempting to execute, the scheme.

The jury had only to weigh the evidence admitted and determine the real issues, to-wit: Was a scheme and arti-

fice formulated to defraud? Did appellants Bridgman and Henson adopt and become parties to said scheme and artifice? Were the United States mails used to execute said scheme and artifice to defraud?

The jury being the sole judges of the fact, found the defendants guilty. Appellee submits that appellants were given a fair trial, free from error, each were clearly guilty of the offense charged, and the verdicts are fully supported by the evidence.

Respectfully submitted,

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No. 12029

United States
Court of Appeals

for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

SALLY KAYE,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

OCT 5 - 1948

PAUL P. O'BRIEN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Witnesses for Defendant:

Kaye, Sally	
—direct	70
—cross	84
Kaye, Peter	
—direct	87

Witnesses for Plaintiff:

Pallanch, Frank J.	
—direct	53
—cross	57
—redirect	62
Mailo, Ann	
—direct	63
—cross	66

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
1206 Santee St.,
Los Angeles 15, Calif.

For Appellee:

H. MILES RASKOFF,
617 S. Olive St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Southern District of California,
Central Division

No. 7763-Y

TIGHE E. WOODS, Acting Housing Expediter,
Office of the Housing Expediter,

Plaintiff,

vs.

SALLY KAYE, DOE I and DOE II,

Defendants.

COMPLAINT FOR RESTITUTION AND
INJUNCTION OF A FIRST CAUSE
OF ACTION

I.

Plaintiff as Housing Expediter, Office of the Housing Expediter, brings this cause of action for restitution pursuant to Section 205(a) to enforce compliance with Section 4 of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Emergency Price Control Act of 1942, as amended, and/or brings this cause of action pursuant to Section 206 of the Housing and Rent Act of 1947, and the Rent Regulations issued pursuant thereto.

II.

Jurisdiction of this cause of action is conferred upon this Court by Section 205(c) of the Emergency

Price Control Act of 1942, as amended, [2] and/or Section 206 of the Housing and Rent Act of 1947.

III.

At all times mentioned herein, up to and including June 30, 1947, there was in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Emergency Price Control Act of 1942, as Amended, for the Los Angeles Defense Rental Area, and/or on and since July 1, 1947 the housing accommodations herein described have been subject to maximum rents authorized and established by the Housing and Rent Act of 1947, and rent regulations issued pursuant thereto.

IV.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

That the defendant is a resident of the City of Laguna Beach, County of Orange, State of California, in the Southern District of California, in the Central Division thereof, and within the jurisdiction of this Court.

VI.

During all times herein mentioned defendant has received rent for the use and occupancy of those certain housing accommodations, subject to said Acts and Regulations within said Defense Rental Area, known and described as 469 Poplar Street, Laguna Beach, California.

VII.

Defendant received from persons for the use and occupancy of the hereinafter described accommodations rents in excess of the maximum rents established by said Rent Regulations; that there is attached hereto and by [3] reference made a part hereof, as though fully set out herein, a statement of the names of the persons overcharged, the period of occupancy of such persons, the maximum rent, the rent received from said persons, and the amount of overcharges.

FOR A SECOND CAUSE OF ACTION

I.

Plaintiff re-alleges and incorporates herein Paragraphs I, II, III, IV, V, VI and VII of his first cause of action as though set out in full herein.

II.

In the judgment of the Housing Expediter, Office of the Housing Expediter, said defendants have engaged in acts and practices in violation of Section 4(a) of the Emergency Price Control Act of 1942,

as amended, USCA Title 50, App. Sec. 901 et seq., and/or in violation of Section 206(a) of the Rent and Housing Act of 1947, which acts and practices consist of violations of Rent Regulations for Housing (10 Fed. Reg. 13528) issued in accordance with Section 2(b) of the Emergency Price Control Act of 1942, as amended, and/or the Housing Regulation issued pursuant to the Housing and Rent Act of 1947, and therefore the Housing Expediter brings this cause of action pursuant to the provisions of Section 206 of the Housing and Rent Act of 1947. Jurisdiction of this cause of action is conferred by Section 206 of the Housing and Rent Act of 1947.

Wherefore, the plaintiff demands:

A. That the defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued thereunder, and/or the Housing and Rent Act of 1947, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by [4] said Acts and said Regulations.

B. A preliminary and final injunction enjoining the defendants, their agents, servants, employees, and all persons in active concert or participation with them from directly or indirectly demanding

or receiving for accommodations subject to the Rent Regulations issued pursuant to the Housing and Rent Act of 1947, rents in excess of the maximum rents permitted under the Rent Regulations issued pursuant to the Housing and Rent Act of 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ RICHARD G. SOLOF,
Attorneys for Plaintiff. [5]

Housing accommodations located at 469 Poplar Str., Laguna Beach, California.

Unit—House.

Tenant's name—Ann Mailo.

Period of Overcharges—9-23-46 to 5-23-47.

Amount Rent Paid Month—\$150.00.

Maximum Legal Rent Month—\$75.00.

Amount of Overcharges—\$600.00.

Statement referred to in Paragraph VII of Plaintiff's First Cause of Action.

[Endorsed]: Filed Nov. 13, 1947. [6]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Sally Kaye, and in answer to plaintiff's complaint herein, for herself and for none of her co-defendants, admits, denies and alleges as follows:

I.

Having no information or belief with respect to the allegations of paragraph "IV" of the First Cause of Action alleged in said complaint, and placing her denial on that ground, defendant denies generally and specifically each and every allegation contained therein.

II.

Answering paragraph "V" of the First Cause of Action alleged in said complaint, this answering defendant denies generally and specifically each and every allegation therein contained. In this connection this answering defendant alleges that she is a resident [7] of the City of Oxnard, County of Ventura, State of California.

III.

Answering paragraph "VII" of the First Cause of Action alleged in said complaint, this answering defendant denies generally and specifically each and every allegation contained in said paragraph and in the schedule incorporated in said paragraph by reference.

By way of answer to the alleged Second Cause of action contained in said complaint, this answering defendant admits, denies and alleges as follows:

I.

Answering paragraph "I" of said alleged Second Cause of Action, and particularly paragraphs "IV", "V" and "VII" of the First Cause of Action which are incorporated by reference in paragraph "I" of the Second Cause of Action, this

answering defendant realleges and incorporates herein paragraphs "I," "II" and "III" of her answer to the First Cause of Action as though set out in full herein.

II.

Answering paragraph "II" of said Second Cause of Action in said complaint, this answering defendant denies generally and specifically each and every allegation therein contained.

Wherefore, this answering defendant prays that this plaintiff take nothing by his action; that the said complaint be hence dismissed; for defendant's costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper in the premises.

/s/ N. MILES RASKOFF,
Attorney for defendant,
Sally Kaye.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 2, 1948. [8]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS PURSUANT TO RULE 36

Plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requests the defendant Sally Kaye, within ten days after service of this request, to make the following admissions for the

purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That at all times pertinent to this action the defendant Sally Kaye was the landlord of the housing accommodations situated at 469 Poplar Street, Laguna Beach, California.

2. That the said premises are within the Los Angeles Defense Rental Area.

3. That on May 19, 1947 the Area Rent Director for the Los Angeles Defense Rental Area issued an order establishing the maximum rent of a house located at 469 Poplar Street, Laguna Beach, California, effective from September 23, 1946. A copy of said order is attached hereto, marked Exhibit "A". [10] The original of said order is on file with the Rent Litigation Unit of the Office of Rent Control, Office of the Housing Expediter and is available for examination by the defendant or her attorney.

4. That Exhibit "A" is in words, figures and substance a copy of said order issued by the Area Rent Director on May 19, 1947.

5. That Exhibit "A", a copy of which is attached hereto, is genuine.

6. That defendant, Sally Kaye, received a copy of said order marked Exhibit "A" on or about May 19, 1947.

7. That one, Ann Mailo, used and occupied the premises located at 469 Poplar Street, Laguna Beach, California, from September 23, 1946, to June 1, 1947.

8. That the defendant Sally Kaye, through her agent Roy W. Peacock and Son, received from said Ann Mailo the sum of \$150.00 as rent for the one month period from September 23, 1946 to October 23, 1946, for the use and occupancy of the above mentioned premises.

9. That on or about September 20, 1946 said Roy W. Peacock & Son, agents defendant Sally Kaye, executed and delivered to Ann Mailo a receipt in writing for the amount of \$150.00, stating on said receipt, "Rent, 469 Poplar Street". A copy of said receipt is attached hereto and marked Exhibit "B".

10. That Exhibit "B", a copy of which is attached hereto, is genuine.

11. That the defendant Sally Kaye, through her agent, Peter Kaye, received the sum of \$50.00 each month during the 7 months for the period commencing October 23, 1946 and ending May 23, 1947, for the use and occupancy of the above described premises.

12. That on or about October 20, 1946, said Peter Kaye, agent of defendant Sally Kaye, executed and delivered to Ann Mailo a receipt in writing for the amount of \$50 as part of the rent for the use and occupancy of the above mentioned premises for the one month period from October 23, 1946 to November 23, 1946. A copy of said receipt is attached hereto and marked Exhibit "C". [11]

13. That Exhibit "C", a copy of which is attached hereto, is genuine.

14. That said Ann Mailo was never given a receipt by said Peter Kaye, showing rent paid for

the use and occupancy of the above described premises, at any time during the period commencing November 23, 1946 and ending May 23, 1947.

15. That the defendant Sally Kaye received from Ann Mailo the sum of \$100.00 each month during the seven months for the period commencing October 23, 1946 and ending May 23, 1947, as part of the rent for the use and occupancy of the above described premises.

16. That said Ann Mailo was never given a receipt by the defendant Sally Kaye, showing rent paid each month for the use and occupancy of the above described premises, at any time during said period commencing October 23, 1946 and ending May 23, 1947.

17. That as of the date of filing this suit more than 31 days had elapsed since the demand and receipt of rent and the tenant above named has not instituted any action against the defendants, pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, prior to the institution of this suit.

Dated: Los Angeles, California, this 13th day of February, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ ASHER SCHEIR,
Attorneys for Plaintiff. [12]

EXHIBIT A

Copy From Area Files (pjb 10-21-47)

OPA Form D-36 (Rev. 3-46)

Stamp of Issuing Office: Office of Housing Expediter, Office of Rent Control, 217 West Second Street, Santa Ana, California.

United States of America
Office of Price Administration

ORDER DECREASING MAXIMUM RENT
REQUIRING REFUND TO TENANT

Concerning (Address of Accommodations) 469 Poplar Street, Laguna Beach, California.

Docket No. 76473.

To: (Name and Address of Landlord) Mrs. Sally Kaye, Oxnard Union High School, Oxnard, California.

To: (Name and Address of Tenant) Tenant-Occupant, 469 Poplar Street, Laguna Beach, Calif.

The Rent Director, after consideration of all the evidence in this matter, has determined that the Maximum Rent for the above-described housing accommodations should be decreased on the grounds stated in Section(s) 5(c)1 of the Rent Regulation, and further for the reason(s) stated in Section(s) 4(e) of the Rent Regulation, the Maximum Rent so decreased and determined by this Order shall be effective from September 23, 1946.

Therefore, it is ordered that the Maximum Rent for the above-described accommodations be, and it hereby is, decreased from \$150.00 per month, to

\$75.00 per month, effective from September 23, 1946. No rent in excess of \$75.00 month (maximum rent established by this order) may be received or demanded.

Landlord pays water.

Any rent collected from the effective date of this Order in excess of the amount provided in this Order shall be refunded to the tenant within 30 days from the date this Order is issued unless the refund is stayed in accordance with the provisions of Section 1300.214 or 1300.225 of Revised Procedural Regulation No. 3.

This Order is now in effect and will remain in effect until changed by the Office of Price Administration.

Issued this 19th day of May, 1947.

.....

Area Rent Director for the Los Angeles Defense-Rental Area. [13]

EXHIBIT "B"

Roy W. Peacock & Son
Realtors and Insurors
295 Forest Ave. Phone 150

No.

Laguna Beach, Calif. 9/20 1946

Received of Ann Mailo One Hundred, fifty & 00/100 Dollars for Rent 469 Poplar Str. Amount Paid \$150.00. Balance Due \$.

ROY W. PEACOCK & SON,
By /s/ RIN.

EXHIBIT "C"

Received Ann Mailo,
Fifty Dollars

10/20/46

PETER KAYE

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 16, 1948. [14]

[Title of District Court and Cause.]

DEFENDANT'S ANSWER TO PLAINTIFF'S
REQUEST FOR ADMISSION PURSUANT
TO RULE 36

Comes now the defendant, Sally Kaye, and by way of answer to plaintiff's request for admissions heretofore filed and served in the above-entitled cause, this defendant admits, denies and alleges as follows:

I.

Admits paragraphs numbered "1" and "2".

II.

With reference to paragraph "3", defendant, Sally Kaye, denies that the order of the Area Rent Director dated May 19, 1947, referred to in said paragraph, established the maximum rent for the house located at 469 Poplar Street, Laguna Beach, California, which was effective from September 3, 1946, or at all. In this connection, defendant, Sally Kaye, alleges that the said order was [16] invalid and of no force and effect.

III.

Admits the allegations of paragraphs numbered "4" and "5" except that this defendant denies that said Exhibit "A" is a valid order and alleges in this connection that it is of no force and effect.

IV.

Admits the allegations of paragraph "6".

V.

Denies the allegations of paragraph "7" and in this connection defendant, Sally Kaye, alleges that the said Ann Mailo and certain other persons used and occupied the premises located at 469 Poplar Street, Laguna Beach, California, from September 23, 1946, to June 7, 1947.

VI.

Denies the allegations of paragraph "8".

VII.

Defendant, Sally Kaye, has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "9", "10", "12", "13" and "14", and for this reason this answering defendant denies each and every allegation in said paragraphs contained.

VIII.

Denies the allegations of paragraph "11".

IX.

Admits the allegations of paragraphs "15" and "17".

X.

Defendant, Sally Kaye, does not have knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "16" in that

this answering defendant does not now recall whether or not she ever gave a receipt for rent to the said Ann Mailo, and for this reason this answering defendant cannot [17] truthfully either admit or deny the allegations of said paragraph "16".

Dated at Los Angeles, California, this 26th day of February, 1948.

/s/ H. MILES RASKOFF,
Attorney for defendant,
Sally Kaye.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Mar. 4, 1948. [18]

[Title of Tax Court and Cause.]

OBJECTIONS TO DEFENDANT'S PROPOSED
FINDINGS OF FACT AND CONCLU-
SIONS OF LAW

Comes now the plaintiff by Frank L. Hirst, his attorney, and objects to the defendant's proposed findings of fact and conclusions of law as follows:

I.

Said defendant's findings of fact failed to allege the jurisdictional facts which this Honorable Court must of necessity have determined to exist. The plaintiff therefore submits the following findings in this regard:

II.

(a) That the plaintiff as Housing Expediter, Office of the Housing Expediter, is the proper party plaintiff duly authorized to bring this action under and pursuant to the Housing and Rent Act of 1947, as amended.

(b) That this Court has jurisdiction of the defendant, Sally Kaye, and of the subject matter of this action. [20]

(c) That at all times pertinent to this action the Controlled Housing Rent Regulation issued under and pursuant to the Housing and Rent Act of 1947, as amended, was in full force and effect in the Los Angeles Defense Rental Area.

III.

Plaintiff objects to the use of the word "filed" in Paragraph 9, Line 30. The evidence offered by the defendant, at most, established that the defendant, Sally Kaye, "deposited in the mail" a Rent Regulation Statement in triplicate, addressed to the Office of Price Administration, Santa Ana, California.

Plaintiff further objects to said Paragraph 9 for failure to include the undisputed evidence that the official files and records of the Office of the Housing Expediter, Orange County Division, located at 217 West Second Street, Santa Ana, California, the successor by law of the custody and control of the official files and records of the Office of Price Administration, located at Santa Ana, California, contained no record of said Registration Statement having been received in the mail or otherwise on

or about October 20, 1946, or at any time thereafter.

IV.

Plaintiff further objects to defendant's proposed findings of fact for failure to include the uncontradicted evidence that on or about February 21, 1947, pursuant to the request of the Office of Price Administration, the defendant, Sally Kaye, did file a Rent Registration Statement with said Office of Price Administration, located at Santa Ana, California, identifying said housing accommodations and reporting a maximum rent therefor in the sum of \$150.00 per month.

V.

Plaintiff also objects to Paragraph 10 of defendant's findings of fact for failure to refer to the express provision contained in said Order of May 19, 1947, ordering the defendant [21] to refund to the tenant any rent collected from the effective date of said order in excess of the amount provided in said Order within thirty days of the date of the issuance of said Order unless said refund provision was stayed in accordance with Sections 1300.214 and 1300.225 of Revised Procedural Regulation No. 3.

VI.

Plaintiff further objects to defendant's findings of fact for failing to include a finding that said defendant, Sally Kaye, had failed to refund to Ann Mailo the amount of rent collected in excess of \$75.00 per month for the period from September 23, 1946, to May 23, 1947, either within the thirty days from the date of said Order or at any

time thereafter, and that said defendant had failed to apply for and/or obtain a stay of the refund provisions in accordance with Sections 1300.214 or 1300.225 of Revised Procedural Regulation No. 3.

VII.

Plaintiff objects to defendant's proposed conclusions of law as set forth on Page 4 as follows:

As to Paragraph 1, beginning with the word "with" on Line 21 and ending with the word "condition" on Line 25. This does not constitute the reason which the Court expressly declared at the time of rendering its decision. The Court assigned the following reasons for its holding that said Order was invalid on its face, namely, that said housing accommodations had never been rented before and the Rent Director had failed to issue an Order within thirty days after the filing of a Registration Statement.

Dated this 14th day of April, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 15, 1948. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 18th day of March, 1948, and having been tried before the Court, sitting without a jury, Frank L. Hirst, Esq., appearing as counsel for the plaintiff, and H. Miles Raskoff, Esq., appearing as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and after hearing the arguments of counsel, and being fully advised in the premises, and the cause having been submitted to the Court for decision, the Court now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That at all times pertaining to this action, defendant Sally Kaye, was the landlord of the housing accommodations situated at 469 Poplar Street, Laguna Beach, California. [24]

II.

That the said premises are within the Los Angeles Defense Rental Area.

III.

That the said housing accommodations had not been rented at any time prior to the 23rd day of September, 1946; and that said housing accommodations were first rented on the 23rd day of September, 1946, and the first rent charged for such ac-

commodations was the sum of One Hundred Fifty (\$150.00) Dollars a month, payable monthly, in advance, on the 23rd day of each calendar month.

IV.

That on or about the 23rd day of September, 1946, there was executed a written lease on said housing accommodations in which the defendant, **Sally Kaye**, was named as lessor, and one Anne Mailo was named as lessee, which written lease was signed by Peter Kaye, a minor son of defendant, Sally Kaye, as agent for said defendant Sally Kaye, the lessor named in said lease, and by the said Anne Mailo, as the lessee named in the said lease. That the term of said lease was for the period commencing on the 23rd day of September, 1946, and ending on the 1st day of June, 1947, and that the rental specified therein was the sum of One Hundred Fifty (\$150.00) Dollars a month, payable monthly, in advance, on the 23rd day of each calendar month for the term of said lease.

V.

That the rental for the first month of said term under said written lease, to-wit: the sum of One Hundred Fifty (\$150.00) Dollars, for the one month period from September 23, 1946, to October 23, 1946, was paid by the said Anne Mailo to that certain real estate firm at Laguna Beach, California, known as Roy W. Peacock & Son, and that of said sum Sixty (\$60.00) Dollars was retained by the said Roy W. Peacock & Son, as a commission, and the balance of Ninety (\$90.00) Dollars was paid by said real estate [25] firm to the defendant, Sally Kaye.

VI.

That thereafter, said Anne Mailo, the tenant of said housing accommodations, paid as rent the sum of One Hundred Fifty (\$150.00) Dollars on or about the 23rd day of the months of October, November and December, 1946, and January, February, March and April, 1947, by paying to the defendant, Sally Kaye, the sum of One Hundred (\$100.00) Dollars on each of said dates and to Peter Kaye, the son of said Sally Kaye, the sum of Fifty (\$50.00) Dollars, on each of said dates. That the said rentals paid covered the period from September 23, 1946, to May 23, 1947.

VII.

That the said Anne Mailo occupied said housing accommodations during and after said term to and including the 7th day of June, 1947, and that no rent whatsoever was paid by said Anne Mailo for the period from May 23, 1947, to June 7, 1947.

VIII.

That under the terms of said written lease, the said Anne Mailo was obligated to pay the telephone bills for said housing accommodations, which telephone was carried under the name of the defendant Sally Kaye. That said Anne Mailo paid each of said telephone bills during the period of her occupancy except the telephone bill for the last month of her term. That said last mentioned telephone bill was in the sum of Twenty-One and 65/100 Dollars (\$21.65) which was paid by the defendant, Sally Kaye, and not by said Anne Mailo.

IX.

Within thirty days after the said housing accommodations were first rented, to-wit: on or about the 20th day of October, 1946, the defendant, Sally Kaye, duly filed, in triplicate, a written statement on the form provided therefor, known as a registration statement, identifying the said housing accommodation and [26] specifying a maximum rent therefor in the sum of One Hundred Fifty (\$150.00) Dollars.

X.

That on or about the 19th day of May, 1947, the Area Rent Director for the Los Angeles Defense Rental Area of the Office of the Housing Expediter, issued an order purportedly decreasing the maximum rent for the said housing accommodations from One Hundred Fifty (\$150.00) Dollars per month to Seventy-five (\$75.00) Dollars per month, which said order provided, on the face thereof, by reference to Section 4(e) of the Rent Regulation for Housing, that the landlord had failed to file a registration statement for said housing accommodations within 30 days after the first renting thereof. That the said order indicated on the face thereof, by said reference, that for the aforementioned reason the reduction in rent was made retroactive to the 23rd day of September, 1946.

CONCLUSIONS OF LAW

I.

That the order decreasing the maximum rent on said housing accommodations, dated May 19, 1947,

was and is invalid on its face with respect to its purported retroactive application by reason of the limitation contained in Section 4(e) of the Rent Regulations for Housing promulgated by the Administrator under the Emergency Price Control Act of 1942, upon which said Regulation the said order was expressly conditioned.

II.

That the maximum rent for the aforesaid housing accommodations during the period involved in this cause was the sum of One Hundred Fifty (\$150.00) Dollars a month.

III.

That defendant is entitled to judgment.

Let judgment be entered accordingly.

Dated this 20th day of April, 1948.

/s/ LEON R. YANKWICH,
United States District Judge.

[Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 20, 1948. [27]

In the District Court of the United States, Southern District of California, Central Division

No. 7763-Y

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Plaintiff,

vs.

SALLY KAYE, et al.,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 18th day of March, 1948, and the court having heard the testimony, having examined the proofs offered by the respective parties, and, after hearing the arguments of counsel, and being fully advised in the premises, and having made findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed:

That plaintiff shall take nothing by his action and that judgment be entered for the defendant.

Dated April 20, 1948.

/s/ LEON R. YANKWICH,

United States District Judge.

Judgment entered April 20, 1948. Docketed April 20, 1948. C.O. Book 50, page 248.

[Endorsed]: Filed April 20, 1948. [29]

PLAINTIFF'S EXHIBIT No. 2

OPA Form D-36 (Rev. 3-46)

Stamp of Issuing Office: Office of Housing Expediter, Los Angeles Defense Rental Area, Orange County Division, 217 West Second Street, Santa Ana, California.

United States of America
Office of Price Administration

ORDER DECREASING MAXIMUM RENT
REQUIRING REFUND TO TENANT

Concerning (Address of Accommodations) 469
Poplar Street, Laguna Beach, California.

Docket No. 76473.

To: (Name and Address of Landlord) Mrs. Sally
Kaye, Oxnard Union High School, Oxnard, California.

To: (Name and Address of Tenant) Tenant-Occupant, 469 Poplar Street, Laguna Beach, Calif.

The Rent Director, after consideration of all the evidence in this matter, has determined that the Maximum Rent for the above-described housing accommodations should be decreased on the grounds stated in Section(s) 5(c)1 of the Rent Regulation, and further for the reason(s) stated in Section(s) 4(e) of the Rent Regulation, the Maximum Rent so decreased and determined by this Order shall be effective from September 23, 1946.

Therefore, it is ordered that the Maximum Rent for the above-described accommodations be, and it hereby is, decreased from \$150.00 per month, to \$75.00 per month, effective from September 23, 1946. No rent in excess of \$75.00 month (maximum rent established by this order) may be received or demanded.

Landlord pays water.

Any rent collected from the effective date of this Order in excess of the amount provided in this Order shall be refunded to the tenant within 30 days from the date this Order is issued unless the refund is stayed in accordance with the provisions of Section 1300.214 or 1300.225 of Revised Procedural Regulation No. 3.

This Order is now in effect and will remain in effect until changed by the Office of Price Administration.

Issued this 19th day of May, 1947.

/s/ B. C. KOEPKE,

Area Rent Director for the Los Angeles Defense-Rental Area. [32]

PLAINTIFF'S EXHIBIT No. 3

LEASE
(General)

This lease, made this 23d day of September, 1946, between Mrs. Sally Kaye, herein called lessor, and Ann Mailo, herein called lessee,

Witnesseth: That lessor, in consideration of the covenants and agreements herein contained, does

hereby lease, demise and let to lessee all that property in the 469 Poplar Street, Laguna Beach, County of Orange, State of California, described as: The Lessee is to pay all utilities and telephone. The Lessor is to pay for water and garbage hauling, together with the appurtenances, for the term of, commencing on the 23d day of September, 1946, and ending on the 1st day of June, 1947, at the monthly rental of One Hundred Fifty and 00/100 Dollars, payable in installments of Dollars, [33] lawful money of the United States, each due and payable in advance on the day of each and every during said term.

This lease is made by lessor and accepted by lessee on each of the following conditions and terms, to-wit:

Lessee hereby covenants and agrees as follows:

First: To pay lessor said rent as hereinabove provided, and in addition thereto to pay, when due, all water, electric, gas and other lighting, heating and power rents and charges accruing or payable in connection with said premises during said term, whether same are pro-rated or measured by separate meters;

Second: Not to assign, mortgage, or hypothecate this lease or any interest therein, or let or sublet the whole or any part of said premises, or make or suffer any alteration to be made in or on said premises, or devote the same to any different use, without, in each instance, first obtaining the written consent of lessor; and this lease, or any interest of lessee therein, shall not be transferable

by operation of law without the written consent of lessor, by reason of any bankruptcy, insolvency or receivership proceedings, or attachment, execution or other judicial process or sale by or against lessee;

Third: Not to call on lessor to make any improvements, replacements or repairs on said premises, but lessee accepts said premises in their present condition and agrees, at his own expense, to keep the same in as good condition and repair as they now are or may hereafter be placed, reasonable wear and tear and damage by the elements or other casualty excepted; and lessee hereby waives any and all rights under Section 1942, Civil Code of California, as to repairs, etc;

Fourth: Not to commit, suffer or permit any waste on said premises, or any acts to be done thereon in violation of any law or ordinance, and not to use or permit the use of said premises for any illegal or immoral purpose;

Fifth: To hold lessor and said premises harmless from any loss or damage resulting from the use or misuse of said premises by lessee, in violation of the terms of this lease; and lessee hereby releases lessor from any and all liability for damages which may be sustained by lessee in connection with the use or occupation of said premises by lessee;

Sixth: To pay lessor all costs and expenses, including attorney's fees in a reasonable sum, in any action brought by lessor to recover any rent due and unpaid hereunder, or for the breach of any of

the covenants or agreements contained in this lease, or to recover possession of said premises, whether such action progress to judgment or not; [34]

Seventh: At the expiration of said term, or any sooner determination of this lease, to quit and surrender possession of said premises, and its appurtenances, to lessor in as good condition as reasonable use and wear will permit, damage by the elements or other casualty excepted;

Eighth: If any rent shall be due and unpaid, or if default shall be made in any of the covenants or agreements on the part of lessee contained in this lease, lessor may, at his option, at any time after such default or breach, and without any demand on or notice to lessee or to any other person of any kind whatsoever, re-enter and take possession of said premises and remove all persons therefrom;

Ninth: If lessee holds over after said term with consent of lessor, express or implied, such tenancy shall be from month to month only and not a renewal hereof, and lessee agrees to pay rent at the rate prevailing at the expiration of said term, and all other charges as hereinabove provided, and also to comply with all conditions, covenants and agreements of this lease for the time he holds over;

Tenth: Lessor may from time to time, at his option, exercise all rights or remedies which he may have either at law or in equity and nothing herein contained shall be construed as in any way abridging or waiving such rights and/or remedies; and consent, waiver or compromise by lessor of or

under any of the provisions of this lease, or as to any breach or default hereunder by lessee, shall not constitute or be construed as a waiver of lessor's right to enforce strict interpretation and performance of the conditions and terms hereof by lessee at all other times and as to the same and all other matters herein contained.

Each and all of the conditions, covenants and agreements herein contained shall, in accordance with the context, inure to the benefit of lessor and apply to and bind lessee, their respective heirs, legatees, devisees, administrators, executors, successors, assigns and sublessees, or any person who may come into possession of said premises or any part thereof in any manner whatsoever.

In this lease, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Witness our hands, the day and year first above written.

/s/ PETER C. KAYE,
Lessor.

/s/ ANN MAILO,
Lessee. [35]

State of California,
County of Orange—ss.

On this day of September, 1946, before me, the undersigned a Notary Public in and for said County, personally appeared known to me to be the

person whose name subscribed to the within instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

.....,

Notary Public in and for said County and State.

—————

[36]

DEFENDANT'S EXHIBIT A

OPA Form D-18

Form Approved

(Rev. 10-45)

Budget Bureau No. 08-R501.2

Stamp of Issuing Office: Office of Temporary Controls, Los Angeles Defense Rental Area, Orange County Division, 217 West Second Street, Santa Ana, California.

United States of America

Office of Price Administration

NOTICE OF PROCEEDINGS BY RENT DIRECTOR

Concerning (Address of Accommodations) 469 Poplar Street, Laguna Beach. California.

Docket No. 76473.

To (Name and Address of Landlord): Mrs. Sally Kaye, Oxnard Union High School, Oxnard, California.

This is not an order, but only a notice of proceedings for adjustment of rent. The maximum legal rent remains unchanged unless and until an order has hereafter been entered.

A preliminary investigation by the Rent Direc-

tor indicates that the Maximum Rent for the above-described accommodations should be decreased.

[X] On the grounds stated in Section 5(c)1 of the Rent Regulation. (See other side.) Therefore, the Rent Director proposes to decrease the Maximum Rent from \$150.00 per month to \$75.00 per month, yearly. Landlord pays water.

[X] The Rent Director further proposes that the order decreasing the Maximum Rent shall be effective to reduce the rent from Sept. 23, 1946 for the reason(s) stated in Section(s) 4(e) of the Rent Regulations. (See other side.)

In the event you wish to file a reply to this proposed action, such reply must be filed within 10 days from the date of this notice.

Written evidence supporting your reply must also be filed. Your statements and supporting evidence should be typed or legibly written. The address of the above housing accommodations and the Docket Number appearing on this notice should be placed on each document filed.

If no reply and supporting evidence are filed within the above period, the Rent Director may enter an order decreasing the Maximum Rent without further notice.

April 2, 1947.

/s/ B. C. KOEPKE,
Rent Director.

[37]

HOUSING REGULATION

Section 5 (c) Grounds for decrease of maximum rent. The Administrator at any time, on his own initiative or an application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that:

(1) Rent higher than rents generally prevailing. The maximum rent for housing accommodations under paragraph (c), (d), (e), (g), or (j) of section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date.

(2) Substantial deterioration. There has been a substantial deterioration of the housing accommodations other than ordinary wear and tear since the date or order determining its maximum rent.

(3) Decrease in services, furniture, furnishings or equipment. There has been a decrease in the minimum services, furniture, furnishings or equipment required by section 3 since the date or order determining the maximum rent.

(4) Special relationship between landlord and tenant or peculiar circumstances. The rent on the date determining the maximum rent was materially affected by the blood, personal, or other special relationship between the landlord and the tenant, or by peculiar circumstances, and as a result was substantially higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date.

(5) Varying rents. The rents on the date determining the maximum rent was established by a

lease or other rental agreement which provided for a lower rent at other periods during the term of such lease or agreement.

(6) Seasonal rent. The rent on the date determining the maximum rent was substantially higher than at other times of year by reason of seasonal demand, or seasonal variations in the rent, for such housing accommodations. In such cases the Administrator's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

(7) Substantial decrease in occupancy. There has been a substantial decrease in the number of subtenants or other occupants since an order under paragraph (a) (8) or (c) (8) of this section.

(8) Rent established under section 4 (i). The maximum rent is established under section 4 (i) and is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date taking into consideration any increased occupancy of such accommodations since that date by subtenants or other persons occupying under a rental agreement with the tenant: Provided, That no decrease shall be ordered below the rent on the maximum rent date.

(9) Modification or elimination of necessity for increase under section 5 (a) (12). There has been a modification or elimination of the necessity for the increase in the maximum rent granted under paragraph (a) (12) of this section, since the order issued under that paragraph.

HOTEL REGULATION

Section 5 (c) Grounds for decrease of maximum rent. The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) Rent higher than rent generally prevailing. The maximum rent for the room is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date.

(2) Substantial deterioration. There has been a substantial deterioration of the room other than ordinary wear and tear since the date or order determining the maximum rent.

(3) Decrease in services, furniture, furnishings or equipment. There has been a decrease in the minimum services, furniture, furnishings or equipment required by section 3 since the date or order determining the maximum rent.

(4) Seasonal demand. The rent on the date determining the maximum rent for the room was substantially higher than at other times of year by reason of seasonal demand for such room. In such cases the Administrator's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

(5) Modifications or elimination of necessity for increase under section 5 (a) (9). There has been a modification or elimination of the necessity for

the increase in the maximum rent granted under paragraph (a) (9) of this section since the order issued under that paragraph.

4 (e) Meals with room. For a room with which meals were provided during the thirty-day period determining the maximum rent without separate charge therefor, the rent apportioned by the landlord from the total charge for the room and meals. The landlord's apportionment shall be fair and reasonable and shall be reported in the registration statement for such room. The Administrator at any time on his own initiative or on application of the tenant may by order decrease the maximum rent established by such apportionment, if he finds that the apportionment was unfair or unreasonable.

EFFECTIVE DATE OF ORDERS

Section 4 (e) Housing Regulation.—First rent after effective date. For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or the effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Adminis-

trator issued prior to September 22, 1942. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

If the landlord fails to file a proper registration statement within the time specified (except where a registration statement was filed prior to October 1, 1943), the rent received for any rental period commencing on or after the date of the first renting or October 1, 1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1). Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order. If the Administrator finds that the landlord was not at fault in failing to file a proper registration statement within the time specified, the order under section 5 (c) (1) may relieve the landlord of the duty to refund. Where a proper registration statement was filed before March 1, 1945, the landlord shall have the duty to refund only if the order under sections 5 (c) (1) is issued in a proceeding commenced by the Administrator before September 1, 1945. Where a proper registration statement is filed on or after March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding commenced by the Administrator within 3 months after the date of filing of such registration statement. The foregoing provisions and any refund thereun-

der do not affect any civil or criminal liability provided by the Act for failure to file the registration statement required by section 7.

Section 4 (j) Housing Regulation.—Changed on or after July 1, 1943, or the effective date of regulation, whichever is the later, from unfurnished to furnished. For housing accommodations changed on or after July 1, 1943, or the effective date of regulation, whichever is the later, from unfurnished to fully furnished, the first rent for such accommodations after such change. The Administrator may order a decrease in the maximum rent as provided in section 5 (c) (1).

Within 30 days after the accommodations are first rented fully furnished, the landlord shall register the accommodations as provided in section 7. If the landlord fails to file a proper registration statement within the time specified, the rent received from the time of such first renting shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1). Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order. If the Administrator finds that the landlord was not at fault in failing to file a proper registration statement within the time specified, the order under section 5 (c) (1) may relieve the landlord of the duty to refund. Where a proper registration statement was filed before March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding

commenced by the Administrator before September 1, 1945. Where a proper registration statement is filed on or after March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding commenced by the Administrator within 3 months after the date of filing of such registration statement. The foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the Act for failure to file the registration statement required by section 7.

Section 5 (b) Housing and Hotel Regulations.—If the landlord fails to file the petition or report required by this paragraph (b) within the time specified, or decreases the services, furniture, furnishings, or equipment, without an order authorizing such decrease where such order is required, the rent received by the landlord for any rental period commencing on or after such decrease or the effective date of regulation (or December 1, 1942, where the effective date of regulation is prior to that date), whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by any order decreasing the maximum rent on account of such decrease in services, furniture, furnishings or equipment. Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order. If the Administrator finds that the landlord was not **at fault in failing to** comply with this paragraph (b), the order may relieve the landlord of the duty to refund. The

foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the Act for failure to comply with any requirement of this paragraph (b). [38]

DEFENDANT'S EXHIBIT B

June 12th, 1947

Office of Housing Expediter
Los Angeles Defense Rental Area
Orange County Division
217 West Second Street
Santa Ana, California

Re: Docket No. 76473

Gentlemen:

This will acknowledge receipt of your order decreasing maximum rent for the premises at 469 Poplar Street, Laguna Beach, California.

A careful consideration of the circumstances of this rental has convinced the undersigned that there are grounds to believe that no refund should be given to the Lessee.

The undersigned, therefore, requests a stay of refund under the procedure set forth in Procedural Regulation No. 3, Sections 1300.214 or 1300.225.

Sincerely,

(Mrs.) SALLY KAYE. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final judgment entered in this action on the 20th day of April, 1948.

Dated this 17th day of May, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed May 17, 1948. [40]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, hereby designates the following portions of the record to be included in the Record on Appeal:

1. Complaint filed November 13, 1947.
2. Answer filed February 2, 1948.

3. Plaintiff's Request for Admissions pursuant to Rule 36, filed February 16, 1948.

4. Entire Reporter's Transcript of all testimony and proceedings at the trial.

5. All Exhibits.

6. Defendant's Answer to Plaintiff's Request for Admissions pursuant to Rule 36, filed March 4, 1948.

7. Plaintiff's Objections to defendant's proposed Findings of Fact and Conclusions of Law, lodged April 15, 1948. [42]

8. Findings of Fact and Conclusions of Law by the Court. Filed April 20, 1948.

9. Judgment of the Court entered April 20, 1948, in Civil Order Book No. 50 at Page 248.

10. Notice of Appeal, filed May 17, 1948.

11. Statement of Points upon which appellant intends to rely on appeal.

12. This Designation.

Dated Los Angeles, California, this 15th day of June, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ ABE I. LEVY,

Attorneys for Appellant, Office of the Housing
Expediter.

[Endorsed]: Filed June 15, 1948. [43]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The following are the Points upon which Appellant intends to rely upon the appeal:

1. The Court erred in refusing to accept the Rent Reduction Order of the Area Rent Director, dated May 19, 1947, as valid and binding for all purposes and in all respects in the proceedings before it.

2. The Court erred in considering the validity of said Area Rent Director's Order contrary to Section 204(d) of the Emergency Price Control Act of 1942, as amended.

3. The Court erred in holding that said Rent Reduction Order was invalid on its face.

4. The Court erred in holding that the violations alleged in the Complaint were not established and in refusing to grant Judgment in favor of the plaintiff, as prayed for in the Complaint. [44]

Dated Los Angeles, California, this 15th day of June, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ ABE I. LEVY,
Attorneys for Appellant, Office of the Housing Expediter.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed June 15, 1948. [45]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND
DOCKETING THE APPEAL

On application of the plaintiff and appellant herein, and good cause appearing therefor, it is hereby ordered that the time for filing the record on appeal and docketing the appeal in the above entitled action is extended to and including July 25, 1948.

Dated this 23rd day of June, 1948.

/s/ LEON R. YANKWICH,
Judge, United States District Court.

[Endorsed]: Filed June 23, 1948. [47]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND
DOCKETING THE APPEAL

On application of the plaintiff and appellant herein, and good cause appearing therefor, it is hereby ordered that the time for filing the record on appeal and docketing the appeal in the above entitled action is extended to and including August 16, 1948.

Dated this July 22, 1948.

/s/ PAUL J. McCORMICK,
Judge, United States District Court.

[Endorsed]: Filed July 22, 1948. [48]

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 7763-Y

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

SALLY KAYE,

Appellee.

APPLICATION FOR ORDER EXTENDING
TIME FOR FILING THE RECORD ON AP-
PEAL AND DOCKETING THE APPEAL
AND ORDER THEREON

Appellant hereby makes application to the United States Circuit Court of Appeals, Ninth Circuit, for an order extending time for filing the record on appeal and docketing the appeal in the above entitled action to and including September 27, 1948, said application being based upon the affidavit of Frank L. Hirst, one of the attorneys for the appellant herein, which is attached hereto.

Dated this 4th day of August, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Appellant.

ORDER

The Court having considered the foregoing application of appellant herein and the affidavit of Frank L. Hirst in support of said application, and good cause appearing therefor, now therefore, it is hereby ordered that the time for filing the record on appeal and docketing the appeal in the above entitled action is extended to and including September 27, 1948.

Dated this 5th day of August, 1948.

FRANCIS A. GARRECHT,

Judge, United States Circuit Court of Appeals,
Ninth Circuit.

[Endorsed]: Filed Aug. 5, 1948, Paul P. O'Brien,
Clerk.

Attest: Aug. 5, 1948, Paul P. O'Brien, Clerk.

[Endorsed]: Filed Aug. 9, 1948. Edmund L. Smith,
Clerk.

In the District Court of the United States for the Southern District of California, Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain full, true and correct copies of Complaint for Restitution and Injunction; Answer; Plaintiff's Request for Admissions Pursuant to Rule 36; Defendant's Answer to Plaintiff's Request for Admission to Rule 36; Objections to Defendant's Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Plaintiff's Exhibits 1, 2 and 3; Defendant's Exhibits A and B; Notice of Appeal; Designation of Record on Appeal; Statement of Points on Appeal; Two Orders Extending Time to File Record and Docket Appeal which, together with reporter's transcript of proceedings on March 18, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 31st day of August, A. D. 1948.

(Seal)

EDMUND L. SMITH,
Clerk.

In the District Court of the United States for the
Southern District of California, Central Division

Honorable Leon R. Yankwich, Judge Presiding.

No. 7763-Y

TIGHE E. WOODS, Acting Housing Expediter,
Office of the Housing Expediter,

Plaintiff,

vs.

SALLY KAYE,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

March 18, 1948

Appearances: For the Plaintiff: Frank L. Hirst,
Esq. For the Defendant: H. Miles Raskoff, Esq.

[1 *]

The Clerk: No. 7763 Civil, Tighe E. Woods vs.
Sally Kaye.

The Court: Counsel ready?

Mr. Hirst: Ready for the plaintiff.

Mr. Raskoff Ready for the defendant.

At the outset the defendant would like to dismiss this action on the ground that the complaint does not state facts sufficient to constitute a cause of action and that the complaint cannot state a

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

cause of action for the period involved. As your Honor will note, there are certain rent statements for the period from December 23rd, 1946 to May 23rd, 1947. No other period is involved here and all of these rent payments as you Honor is aware occurred while the Emergency Price Control Act of 1942 was in effect as amended.

We make this motion on the ground that the Housing Act Section 203(a) thereof, the terminology repeals the saving clause of the 1942 statute. In the 1942 statute there is the express saving clause that the Act expires by its terms and the section provides that after the effective date of this title, no maximum rent shall be established or maintained under the authority of the Emergency Price Control Act of 1942, as amended, with respect to any housing accommodations.

If the Court please, the only meaning that can be given [3] to that section is the repealing of the saving clause in the 1942 statute because by the very terms of the 1942 statute as amended in 1945, rent controls were terminated. Otherwise the words have no meaning, and we cannot assume that Congress put in a meaningless section in the statute.

The Court: However, Section 29 of Title I provides that the expiration of any temporary statute shall not repeal any cause of action.

Mr. Raskoff: That is correct, your Honor, but there is also the proviso in Section 29 that unless the repealing act expressly provides for the abatement or termination of the cause of action—

The Court: That is correct. The new statute did not so provide.

Mr. Raskoff: Section 203(a) in stating expressly that no maximum rent shall be established or obtained can mean nothing else.

The Court: That is not the point. That refers to the future ones. The maximum rents established before are saved by the provision, regardless of the provision of the statute. Somebody in 1943, anticipating that somebody was going to raise the question, and as I happened to be in the criminal department during that month when the statute was not in effect, I got on the bench and stated in advance before any lawyers began to tell me that the action was abated [4] that there was a section, and I called attention to that section which says that no action, civil or criminal, shall abate regardless of the expiration of the statute.

Mr. Raskoff: I want to make it clear, your Honor, that in this case the action was not filed until after—

The Court: It does not make a bit of difference. I have passed on this action at least a hundred times in Fresno, San Diego, and Los Angeles, and the point is not well taken. The motion will be denied. Proceed with the evidence.

FRANK J. PALLANCH,

a witness called by and on behalf of the plaintiff,
having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Frank J. Pallanch.

Direct Examination

By Mr. Hirst:

Q. What is your business or occupation?

A. Examiner with the Rent Control Board at Santa Ana.

Q. That is the field office of the Los Angeles Area rent office, is it not? A. That is right.

Q. I call you attention to the premises located at 469 Poplar Street, Laguna Beach, California. Is that within [5] the jurisdiction of your office?

A. It is.

Q. You state you are an examiner?

A. Yes.

Q. In your position do you have access to the official files and records of the office of the Housing Expediter with regard to the property and maximum rents for this property in your jurisdiction?

A. I have.

Q. Do you have the maximum rent records relating to the premises at 469 Poplar Street, Laguna Beach? A. I have.

Q. Mr. Pallanch, will you refer to the records which you have with you and state to the Court the existence or nonexistence of a registration statement having been filed with your office with

(Testimony of Frank J. Pallanch.)

regard to this property. Is there a registration statement in the files?

A. There is a registration statement in the files, yes sir.

Q. Does the statement show on what date that was filed with your office?

A. Yes, sir. It was received February 21st, 1947. It was postmarked February 20, 1947.

Q. What signature is indicated there in the landlord's space? [6]

A. Sally Kaye.

Mr. Hirst: Your Honor, I have already exhibited to counsel a copy of this registration statement.

The Court: What is it?

Mr. Hirst: It shows \$150.00 a month registered, your Honor. He has stipulated we may submit into evidence a copy of the original registration as Plaintiff's Exhibit 1.

Mr. Raskoff So stipulated.

The Court: All right.

The Clerk: Plaintiff's 1 in evidence.

(Plaintiff's Exhibit No. 1 set out in full, page 26, of this printed Record.)

Q. By Mr. Hirst: Mr. Pallanch, following the filing of that registration statement with your office on February 21st 1947, was any action taken by your office with regard to modifying that registration? A. Yes, sir.

Q. Will you indicate the nature of that action?

A. An order was issued.

(Testimony of Frank J. Pallanch.)

Q. Please state the date that order was issued.

A. May 17, 1947.

Q. To whom was the order directed?

A. Directed to Mrs. Sally Kaye.

Mr. Hirst: Your Honor, similarly in regard to the order, Mr. Raskoff has stipulated with me that we might use a copy of the order.

Mr. Raskoff: If your Honor please I stipulated that [7] if admissible I would stipulate to a copy. Are you offering this, counsel?

Mr. Hirst: I am offering it as Plaintiff's Exhibit 2.

Mr. Raskoff: I will object to the admission of this document in evidence upon the ground that the order on its face is an invalid order. There is no allegation in this complaint—it is rather lengthy and if the Court would reserve a ruling until the conclusion of this case?

The Court: I have heard hundreds of these, and unless you have something new, I do not care to hear you. The Supreme Court has recently ruled on the validity of the order, and there are all sorts of cases holding that you can't make an order retroactive, and retroject it into the past.

Mr. Raskoff: My point is not directed to any of those grounds you have mentioned. It is my contention that the Housing Expediter, by the provisions of the statute, has no authority to issue such an order.

The Court: The Supreme Court just the other day sustained all the powers of the Housing Expediter.

(Testimony of Frank J. Pallanch.)

Mr. Raskoff: I have that case, your Honor, sustaining the constitutionality of the new statute, but it is my contention that this order was made under the final statute.

The Court: I am not interested, because I believe we are still at war and all the war powers given to the President are effective. [8]

Mr. Raskoff: My point is simply this, that by the provisions of the 1942 statute that the Office of Price Administrator was given authority to administer the provisions of that statute.

The Court: You had better tell that to the Circuit Court, because I believe the Administrator has all the powers that are available under the War Powers Act; so I will overrule the motion. It may be admitted in evidence.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Plaintiff's Exhibit No. 2 set out in full, page 27, of this printed Record.)

The Court: Mark you, that does not mean any criticism of you in urging the motion, because the Supreme Court might some day change its mind, but as it stands today there is no point that can be raised in these cases that I have not ruled on a hundred times in the Northern Division, the Central Division and the Southern Division. Therefore I don't care to hear any argument. The objection will be overruled.

Q. By Mr. Hirst: Mr. Pallanch, is that order, so far as your office is concerned, in full force and effect? A. Yes.

Q. It has no further modifications that have been made since the issuance of that order?

(Testimony of Frank J. Pallanch.)

A. It has none.

Mr. Hirst: That is all. [9]

Cross Examination

By Mr. Raskoff:

Q. Mr. Pallanch, do you have before you the file concerning the housing accommodations at 469 Poplar Street, Laguna Beach? A. I do.

Q. Does that file indicate any correspondence between your office and Mrs. Kaye concerning the registration, prior to the registration you testified to? A. Yes, sir.

Q. Would you refer to that correspondence? I believe there is a letter dated February 1, 1947 from Mrs. Kaye to your office.

Mr. Hirst: Your Honor, I know the purpose of counsel's questions. He is intending, I believe, to show probably by his client's testimony that she had filed a prior registration with the office in Santa Ana before the one of February 21st, which has been admitted into evidence. However, the order of the Director has been issued or made in 1947, and is the basis of the maximum rent upon which we rely here, and for that reason I believe that any questioning back of the order for that purpose would be immaterial.

The Court: You know my views. I allow in these cases testimony relating to the background of the order. The order might have been erroneous. You know that we have had [10] cases where the Office of Price Administration accepted the registration from somebody who had no authority to

(Testimony of Frank J. Pallanch.)

register. I remember a case I tried in Fresno, where the man who had been employed as the manager had actually left the property and it had changed hands, and the Office of Price Administration brought him in and had him file a registration. I held that he had no authority to make a registration. Therefore, the question is always as to whether the person who made the registration had authority to make it.

Mr. Hirst: I see your point there, your Honor, and I have been counsel in cases where that has been done. But that is not the point here. Here we have an order that has been subsequently issued, and that order within its own four corners establishes the maximum rent.

The Court: Suppose they went out and got somebody on the street who made a new registration, and who was not authorized by the order, therefore the order will be invalid on its face.

Mr. Hirst: Admittedly, your Honor, it would be invalid in that case.

The Court: I have had cases where a place has changed ownership and they got somebody who was employed by the previous owner, and got him to make the registration, and I held he could not do that because there was no registration.

Mr. Hirst: That may be true as to registrations, but [11] this is an order, a different type of record. It is the official action of the Director himself.

The Court: That does not matter. If he made the order on an invalid registration, and the matter

(Testimony of Frank J. Pallanch.)

was not pending before him for determination, his order is invalid.

Mr. Hirst: I am satisfied that the courts have held—

The Court: I know what the courts have held. I set this case for trial and I am going to hear it on the facts, and I will determine it, not on any technicalities raised by counsel.

Mr. Hirst: For the record, I object to the question.

The Court: I will overrule the objection.

The Witness: There is a letter here dated February 1st. Is that the one you had reference to?

Mr. Raskoff: Yes. This is the original record from the O.P.A. file. I think it is short.

The Court: Will you read it into the record?

The Clerk: (To the witness) Will you please read it in the record?

The Court: I will read it.

“February 1, 1947

Oxnard Union High School

Oxnard, California

Los Angeles Defense Rental Area

Orange County Division

217 West 2nd Street

Santa Ana, California. [12]

“Attention: B. C. Koepke

“Gentlemen:

“The landlord's copy of the registration statement for 469 Poplar Street, Laguna Beach. was sent to your office along with the other three copies

(Testimony of Frank J. Pallanch.)

in October. I thought it was necessary for your office to record the copies. I did, however, keep a copy for my personal file, from which re-registration can be made in duplicate, if you are still unable to find the original.

“In the meantime I enclose the following information:

“The house is now renting for One Hundred and Fifty Dollars (\$150.00) a month; the lease expires June 1, 1947.

“Yours very truly.

/s/ (Mrs. G. I.) SALLY KAYE,
Santa Ana D.R.A.”

Received Feb. 7, 1947.

Q. By Mr. Raskoff: Mr. Pallanch, does your record contain an earlier letter dated on or about October 20, 1947 from Mrs. Kaye, concerning the rental of this property? Excuse me, Mr. Pallanch; I meant October 20, 1946.

A. No, it does not.

Q. Does your file contain any correspondence between your office and Mrs. Kaye concerning the registration of this house, at any time prior to the letter of February 1st which [13] the Court has read into the record?

A. There is a notation here. It has reference to a call from Mrs. Kaye made to our office.

Q. What is that notation?

A. That is February 24, 1947.

Q. This was after. I am asking you about the correspondence prior to the letter of February 1st, 1947.

A. Yes, sir, January 21st.

(Testimony of Frank J. Pallanch.)

Q. To whom is that letter addressed? From whom is it?

A. It is addressed to the Office of Price Administration, Attention Mrs. Thompson.

Q. Who signed the letter?

A. It is signed Mrs. Sally Kaye.

Q. Will you read the letter?

Mr. Raskoff: (Reading)

"I received this communication today addressed to Unit 6, Block 2, Oxnard, California (it was re-addressed Block 2, Unit 6 by the local post office). Future communications should be addressed (as were the registration blanks mailed to me from your office in October) in care of Oxnard Union High School to insure their prompt delivery.

"The 469 Poplar Street house was registered in October. My address was given as Box 75 Laguna Beach, [14] California, which is permanent.

"I am confident that the confusion in addresses will account for the seeming violation. I regret any inconvenience which this matter has caused your office.

"Sincerely yours,

/s/ Mrs. SALLY KAYE,

(Permanent) (Box 75 Laguna Beach, Calif.)

(Present address c/o Oxnard Union High School, Oxnard, California, Oxnard 111.)"

Q. By Mr. Raskoff: Does your file contain any registration of these premises dated earlier than

(Testimony of Frank J. Pallanch.)
that Plaintiff's Exhibit A, which has been received
in evidence? A. It does not.

Mr. Raskoff: Nothing further.

Redirect Examination

By Mr. Hirst:

Q. You have examined the files of the office at
Santa Ana for an earlier registration?

A. I have.

Q. The file contains notification, doesn't it, to
Mrs. Kaye of the letters which she wrote, which
were read into the record to the effect that the
office had no record of any such registration?

Mr. Raskoff: I have no objection to this line
of testimony except that I object to leading the
witness. I submit that the letters speak for them-
selves.

The Court: He is merely directing attention to
a special [15] letter.

Q. By Mr. Hirst: Have you the letter written
to Mrs. Kaye following the receipt of that last
letter by your office? A. Yes, we have.

Q. Will you read the contents of that letter
into the record?

"8-R-LA-256-AD-8

"United States of America, Office of
Price Administration

"Re: 469 Poplar, Laguna Beach, Cal.

Ref. No. C-5610 Date 1/28/47

"The records of this office do not indicate that
you have filed a registration statement for the

(Testimony of Frank J. Pallanch.)

above accommodations. All registration statements are filed at this office under rental address and we do not have a statement for 469 Poplar in file. If this property was registered by you in October, 1946, kindly send in your copy of the registration statement so we may make a further search of our files. It will be necessary for you to re-register the property if you do not have the landlord's copy. Kindly return this notice with your reply within five days.

B. C. KOEPKE.

“SALLY KAYE,

Oxnard Union High School, Registration Section,
Oxnard, California.” [16]

ANN MAILO,

a witness called by and on behalf of the plaintiff,
having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Ann Mailo.

Direct Examination

By Mr. Hirst:

Q. Miss Mailo, where do you at present reside? A. 357 Mermaid, Laguna Beach.

Q. Were you ever a tenant at the housing accommodation located at 469 Poplar Street, Laguna Beach? A. Yes.

Q. Do you recall what period you occupied the premises?

(Testimony of Ann Mailo.)

A. From September 23rd, 1946 to June 1 of 1947—June 1st.

Q. Do you recall the circumstances of your renting that particular accommodation? Do you recall the incidents with regard to the rental?

A. Yes.

Q. With whom did you negotiate for the rental of those premises?

A. Peter Kaye, at the real estate office in Laguna.

Mr. Raskoff: In order to save time I am willing to stipulate this witness was a tenant; that she executed a [17] lease with the son of the defendant, and this is a copy of the lease and I stipulate that it may be received in evidence.

The Court: All right.

Mr. Raskoff: I will admit this was ratified by Mrs. Kaye.

Mr. Hirst: You have already admitted it in answer to the question for admissions, that she was the landlord.

Mr. Raskoff: That is right.

The Clerk: Plaintiff's 3 in evidence.

(Plaintiff's Exhibit No. 3 set out in full, page 28, of this printed Record.)

Q. By Mr. Hirst: Did you pay the sum of \$150.00 each and every month, Miss Mailo?

A. Yes, I did.

Q. With reference to the last portion of your occupancy there, a short period following May

(Testimony of Ann Mailo.)

23rd, 1947, did you make payment of rental for the following time you were there?

A. No, I did not.

Q. How much longer were you there after May 23rd?

A. It was, I think, the 1st of June. I am not sure. It might have been a little after, the 4th or 5th. I am not sure how long it was.

Q. Had you received a copy of the order of the Rent Director prior to that time?

A. Yes, I did.

Q. Did you have any discussion or communication with Mrs. Kaye with regard to the rental for that period? [18]

A. No, not that I remember.

Q. Did she demand payment?

A. Yes, she sent me a bill for it, or left the bill at the door. I think it was Peter left it.

Q. What was your reply?

A. I talked to her on the phone a short time after that and requested she take it off of the amount that she owed me.

Q. How long a period was that, from May 23rd to what time you did not pay the rent for the last period?

A. I don't remember. It was probably a matter of two weeks.

Q. Who occupied the premises with you?

A. Miss Haynes and Miss Thompson for a short while.

Mr. Hirst: I think that is all, your Honor.

(Testimony of Ann Mailo.)

Cross Examination

By Mr. Raskoff:

Q. Miss Mailo, under the lease and arrangement you had with Mrs. Kaye, you were obligated to pay for the telephone bill, were you not?

A. That's right. She has forwarded the bill to me every month.

Q. You did not pay all the telephone bill?

A. The last one was not paid because it was not sent [19] to me.

Q. You did not pay the last telephone bill?

A. No.

Q. Under your written lease with Mrs. Kaye you were obligated to maintain the yard surrounding this house, and to maintain the furnishings and furniture in the house in reasonably good condition, is that correct? A. That's right.

Q. Did you do anything to take care of the yard?

A. To the best of my ability I tried to keep it watered and the lawn mowed.

Q. Did you ever receive notice from the city concerning the destruction of weeds?

A. There was a notice concerning the back lot from the house that the weeds would have to be destroyed.

Q. Did you destroy the weeds?

A. No, I did not.

Q. How many dogs did you have in the house?

A. Two.

(Testimony of Ann Mailo.)

Mr. Hirst: I will object, your Honor, to this line of questioning.

The Court: I will sustain the objection. You cannot void a rent order by showing that they did things which they were not supposed to do, even by the keeping of dogs or human beings. It is not material whether she had babies or dogs [20] which are not permitted, because if you rent the property you do not put in those exceptions. Then your remedy was to go to the office of the Price Administration and make a change. You cannot by fiat of your own change the order by saying she was having two persons; that you rented to two persons instead of four, or that she had dogs or babies. That is propaganda being used by the real estate boards for avoiding the law, but that is not a legal reason for disobeying the law, because you have a proper remedy, and that is to go before them and ask for a change for multiple occupants, whether it be babies or anything else.

Mr. Raskoff: I understand that, your Honor. I don't want the Court to understand that it would go to any interest in the matter: it is merely laying the foundation for showing an offset for damages to the furniture.

The Court: You haven't filed a counter claim. It is not permissible in these cases, as I have held dozens of times, to file a counter claim for damages, because the litigant here is the United States of America and you can't have a counter claim against the United States of America.

(Testimony of Ann Mailo.)

Mr. Raskoff: I respect the Court's ruling on that, but in reading the complaint, however, your Honor, I notice that it asks for an order of the Court directing the defendant to make a refund to the tenant.

The Court: The Court can do that, but the tenants are [21] not the litigants in the case. I have held, and held consistently, that I cannot order a refund to the persons, but merely direct, as if and when the moneys are collected, that the moneys be turned over to the persons, but these persons are not the litigants in the case.

Mr. Raskoff: In this case the prayer is a little different.

The Court: It doesn't make any difference whether the prayer is different or not. In our courts the prayer does not matter.

Mr. Raskoff: This being an equitable action, and since an equitable defense—

The Court: No, it does not make a bit of difference. If she has any claim against the tenant she can go to the Municipal Court and assert the same. They are not assertible in this court, and I have sustained motions to dismiss against every attempt to do that in these cases. It is so settled I don't want to hear any more arguments.

Q. By Mr. Raskoff: Miss Mailo, the first month's rent at the time of the lease was not paid to Mrs. Kaye? Is that correct? A. No.

Q. To whom did you pay the first month's rent?

A. To Peter at the real estate office.

(Testimony of Ann Mailo.)

Q. Did you pay it to Peter or to the real estate office? [22]

A. I think it was paid to Peter. I am almost sure his signature is on the receipt. I may be wrong.

Q. Perhaps your recollection will be refreshed. Have you kept the receipt?

A. Miss Haynes has it.

Q. Miss Mailo, I show you a document bearing the letter head of Roy W. Peacock & Son in Laguna Beach, dated September 2nd, 1946, and ask you if that is the receipt that you received for \$150.00, paid upon the execution of this lease?

A. Yes.

Q. Now that you have seen that receipt, is your answer to the previous question the same? Did you pay this money to Peter Kaye or to the rest estate agent?

A. I still say it was paid to Peter. He received the money.

Q. Did you make payment to Peter Kaye or pay the real estate agent?

A. I really don't remember; the transaction took place in the real estate office.

Q. You received the receipt from the real estate agent?

A. Yes, because of the fact that the house was in their hands for the rent.

Q. Thereafter, Miss Mailo, who did you make the rent [23] payments to?

A. I sent \$100 to Mrs. Kaye and \$50 to Peter;

(Testimony of Ann Mailo.)

different checks or money orders.

Mr. Raskoff: No further questions.

Mr. Hirst: That will be all. The plaintiff rests, your Honor.

The Court: Put on your proof.

SALLY KAYE,

the defendant, called as a witness in her own behalf, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Sally Kaye.

Direct Examination

By Mr. Raskoff:

Q. What is your occupation, Mrs. Kaye?

A. I teach at the Oxnard Union High School, English and American problems.

Q. Are you the owner of the premises involved in this proceedings, 469 Poplar Street, Laguna Beach?

A. Yes, I am.

Q. Have you ever rented the premises prior to the time you rented to Miss Mailo?

A. No, she was the first tenant. [24]

Q. Who had lived in the house prior to that time?

A. My mother and father lived there prior to their death. My son, my sister, and my sister's child during that period when she was in service in the Army.

(Testimony of Sally Kaye.)

Q. When did you first learn of the renting of the house to Miss Mailo?

A. It was the 24th or 25th of September. I telephoned my house at Laguna Beach to see if my son had left there for college or what had happened down there. Somebody answered the phone. I asked for Peter Kaye and she said he was not there. I said, "This is Mrs. Kaye." The voice said, "Mrs. Kaye does not live here any more. I am the new tenant." I was surprised because I did not know there was one. I talked to her and she said that Peter had rented the house through Mr. Peacock. She was very pleasant. I said I would check into it; was there anything that she needed. She said no, she had everything she needed. The house was very clean. Peter had done everything.

Q. That is not necessary to go into.

A. I did not know anything about the renting of the house until I phoned.

Q. When was it, the best that you can recall, that you had the conversation?

A. The 24th or 25th of September, 1946.

Q. After the conversation did you have any occasion to [25] communicate with the Office of Price Administration?

A. Yes.

Q. When was that, Mrs. Kaye?

A. Following a conversation the next day with my son I said would Peacock take care of the O.P.A.; did he ask them about it? Yes, he checked with them but they can't register the house. We

(Testimony of Sally Kaye.)

will have to do it. I said, "Will you take care of it?"

He said no, but the Peacock office said they would do it. I sat down and wrote a note.

Q. To whom did you direct it?

A. I just initialed it.

Q. Do you have a copy of the note with you?

A. No, I don't have a copy of it at all.

Q. Do you remember what you said?

A. Yes, I think I remember exactly.

Q. State the contents the best you can recall, what you said in that letter.

A. I said I wished to report the rental of my house at 469 Poplar Street, Laguna Beach, as of September 3rd to May 23rd.

Q. Did you in that note state the amount of money? A. I don't remember.

Q. Did you receive a reply from the O.P.A. to that letter? A. No. [26]

Q. When was the next occasion you had any correspondence with the O.P.A.?

A. It was the 15th of October.

Q. What was the nature of that correspondence?

A. I then wrote a letter and addressed this letter to the O.P.A., Santa Ana, California, and said, that I had been in communication with the Ventura office inasmuch as I could not get the Santa Ana office, and they had advised me that there were some registration blanks which should

(Testimony of Sally Kaye.)

be filled out and would they kindly send them to me.

Q. Did you receive a reply to that letter?

A. I did.

Q. What was stated?

A. Two days later they sent me some registrations which I immediately filled out, so I can't see why there wasn't some communication—

Mr. Raskoff: Just a minute. Am I correct in restating your testimony that on or about the 15th of September you wrote the O.P.A. requesting a registration? A. The Witness: No, October.

Q. By Mr. Raskoff: When did you receive their reply enclosing the blanks?

A. I don't remember the date.

Q. Did you fill out the registration forms?

A. Yes, that same day, Saturday. [27]

Q. Did you return them to the Office of the Price Administration?

A. I did, and I sent all the blanks back, because I thought my copy would have to be okayed by them in order to be valid, but when I sent them back, for my own file I copied everything.

Q. Did you hear anything further from the O.P.A. in this matter?

A. Yes; not for a long time.

Q. When was the next time you heard anything, as best you can recall?

A. I telephoned them and I asked their advice about having Miss Mailo move from the property.

Q. When was that?

(Testimony of Sally Kaye.)

A. That was early in January.

Q. Did you have any conversation or communication with the O.P.A. with respect to the registration?

A. Yes.

Q. If you did, tell me when it was.

A. I think it was in February.

Q. What was the nature of that communication?

A. It was a regular form. They said I had not registered the house; that they had no registration.

Q. Did you reply to that notice?

A. Yes, I did. [28]

Q. When did you reply?

A. In just a day or so. It would be about the 20th of February.

Q. What was the nature of that reply?

Mr. Hirst: I object. It is not the best evidence.

Q. By Mr. Raskoff: Do you have a copy of your reply, Mrs. Kaye?

A. With me?

Q. Yes.

A. No, I don't.

Q. Do you, counsel?

Mr. Hirst: I think we have it in the file.

Q. By Mr. Raskoff: Mrs. Kaye, I show you a letter which is typewritten, with the date February 1, 1947. It is from the Los Angeles Defense Rental Area, Orange Division, and ask you if that is your signature?

A. Yes.

Q. Will you read that letter and tell the Court whether or not that is the letter you sent the O.P.A. in reply to their notice?

(Testimony of Sally Kaye.)

A. This is the letter.

Mr. Raskoff: If your Honor please, this is the same letter which was read into the record awhile ago. You heard Mr. Pallanch testify concerning what transpired between you and the O.P.A. subsequent to the receipt of that letter, did [29] you not, Mrs. Kaye? A. I listened to it.

Q. And was that what transpired after the receipt of this letter?

A. I don't understand the question. Was what transpired?

Q. The correspondence between you and the O.P.A. was substantially that to which Mr. Pallanch testified?

A. Yes, except he left some out.

The Court: Tell us what he left out.

A. Maybe I am just confused, your Honor, but he said he did not have any correspondence from me prior to a certain date. It seems strange that they would send me blanks out of the blue to fill out that way.

The Court: You can't answer the question?

The Witness: He said I had no communication with the office. They sent what I requested and it seems to me that I must have made a request some place.

Q. By Mr. Raskoff: Mrs. Kaye, at the termination of this correspondence concerning which you have testified with Mr. Pallanch, did you re-register the house?

A. I re-registered the house.

(Testimony of Sally Kaye.)

Q. Where did you get the information that you included in the registration statement?

A. I copied it word for word out of the same places [30] that I had made in the first in my personal files of the original registration I mailed to their office, I believe the 20th of October.

Q. After you filed the second registration, Mrs. Kaye, did you have any further communication with the O.P.A. with respect to the maximum rent?

A. Yes.

Q. What was the nature of the next communication you received? When was it received, Mrs. Kaye, if you recall?

A. I recall that the next written communication I had with that office was in February, at which time I received notice from them saying there had been an investigation of the premises and there was an overcharge in the rent; that I was in violation, and would I state my case or something like that.

Q. I show you an O.P.A. Form D-18, dated April 2nd, 1947, and ask you if that is the communication that you received from the Office of Price Administration? A. It looks like it.

Q. Is it the one that you received, Mrs. Kaye?

A. Yes.

Q. Do you recall when you received this notice?

A. Exactly, do you mean?

Q. As best you can recall.

A. April 1st or the end of March. [31]

Q. Between the time that you filed the regis-

(Testimony of Sally Kaye.)

tration and the time that you received this notice, did you have any other correspondence with the O.P.A. concerning this?

A. No, I did not hear anything from them.

Mr. Raskoff: I offer this notice in evidence as defendant's exhibit.

Mr. Hirst: No objection.

The Court: It may be received.

The Clerk: Defendant's A in evidence.

(Defendant's Exhibit A set out in full, page 36, of this printed Record.)

Q. By Mr. Raskoff: Did you make a reply to that notice, Mrs. Kaye?

A. I don't remember; if they asked me to I did.

Mr. Raskoff: Counsel, do you have a copy in your file of Mrs. Kaye's reply?

The Court: I think we had better take a short recess, so that you may look at the file and see what they may have that you want.

(Short recess.)

Q. By Mr. Raskoff: Mrs. Kaye, after receipt of Defendant's Exhibit A did you send a reply to the Office of Price Administration?

A. Yes, I did.

Q. I show you a letter dated April 9, 1947, and ask you if that is in your handwriting?

A. It is, yes. [32]

Q. Is that the reply that you sent to the office?

A. Yes.

(Testimony of Sally Kaye.)

Mr. Raskoff: Your Honor, counsel for the Government states that he is reluctant to let this out of his file. May it be read?

Mr. Hirst: I have no objection to having it read into the record.

Q. By Mr. Raskoff: Would you read the letter?

The Court: No, you read it into the record.

Mr. Raskoff: (Reading) "April 9, 1947." And a stamp indicating it was received April 11, 1947.

"Office of Temporary Controls
Santa Ana, California

Attention: Miss Thompson

(Docket 76473)

Dear Miss Thompson,

As you undoubtedly recall, I spoke with you last week when I was in Laguna for spring vacation, relative to petitioning your office for summer rental rates in the property at 469 Poplar Street. You told me at that time that your office had mailed me a notice to Oxnard of preliminary proceedings for suggested reduction in rent. I have received the communication and it is quite a blow.

I should like to protest the suggested reduction as unreasonable and unfair. The lease was drawn by a [33] reputable and established real estate firm, who did not question the amount of rent asked. In December, despite the lease, when the tenant implied to my son that she might not be able to afford

(Testimony of Sally Kaye.)

to keep the house, I telephoned her and gave her the privilege of moving. She did not avail herself of the opportunity; I said and did nothing about the very late payment of the rent, as it was Christmas time.

“It cannot help but occur to me that the tenant rented the house with the idea of getting it and then demanding a lower rent. Two other girls share the house with her, the legality of which I have questioned. No permission was asked of me.

“If the suggested rental reduction was granted it would leave me, after making the payment on the house, paying the water and repairs, about fifteen dollars. The point of renting the house is to enable my son, (of whom I am the sole support) to go to college.

“I do not know when or by whom the inspection was made. I should like to say that just looking at the place, surrounded by weeds, bottles, etc. makes me ill. The tenant and the other occupants have allowed the house and grounds to deteriorate unbelievably. The only requests the tenant has made from me—I have taken care of a plumbing repair; and a new carpet-sweeper—and [33-A] permission to remove a bed.

“In addition to being one of those ‘poor teachers’, and general reasons, I base my protest on rental reduction chiefly on relative rental in the Laguna community, etc.

“At present in order to have some income from my Laguna house, I am living in a housing pro-

(Testimony of Sally Kaye.)

ject. It is a government project, and for two rooms and a bathroom, which has no wash bowl, I pay \$31.75 a month. No rugs, linen, dishes, blankets, etc. are furnished. There is a kerosene cooking stove and an oil-burning water heater and stove in the living room. The structure is a cracker box of plywood, which teeters on four cement foundation blocks. I cannot reconcile a government housing rental such as I pay with the proposed rental of 469 Poplar St. Laguna, with unit heat, two bathrooms, fire-place, electric refrigeration, some five thousand dollars worth of furniture, one-residence zoned neighborhood, view, garage, etc. and three times as many rooms.

“I shall protest any reduction in rental—(in court, if necessary!) because I think it is unfair

“Any consideration you can give to my point of view, I shall deeply appreciate.

Very Sincerely,

(Mrs. S. P.) SALLY KAYE.

“P. S. How do I proceed re-summer rates—or rental of rooms?” [33-B]

Mr. Hirst: I have no objection to reading it in, may it please your Honor, and submitting it in evidence. The only thing we object to is the part which is obviously immaterial as to what the order states as to the rent so far as it relates to a protest.

The Court: Objection overruled. It may be received.

(Testimony of Sally Kaye.)

Q. By Mr. Raskoff: I show you, Mrs. Kaye, Plaintiff's Exhibit No. 2 which is an order decreasing the maximum rent and requiring a refund to the tenant, and ask you if that is the next communication you received from the O.P.A. after writing the letter which I just read into the record? A. Yes.

Q. Plaintiff's Exhibit No. 2 shows the date of May 19, 1947. Did you receive that on or about that time? A. Yes, I did.

Q. And it refers in this notice, Mrs. Kaye, to a procedure for staying the refund. Did you communicate with the O.P.A. concerning a stay for a refund?

A. I don't understand the word "stay."

Q. Did you have occasion after receiving that notice from the O.P.A. to ask the O.P.A. to postpone the making of a refund to the tenant?

A. I don't remember. I think I did.

Q. Mrs. Kaye, I show you a letter dated June 12th. [34] A. I wrote that.

Q. Was that written after the receipt of the notice of Plaintiff's Exhibit No. 1?

A. Yes, it was.

Mr. Raskoff: Your Honor, counsel has stipulated this is a carbon copy of the original which is in his files. I offer it in evidence.

The Court: Very well.

The Clerk: Defendant's Exhibit B in evidence.

(Defendant's Exhibit B set out in full, page 42, of this printed Record.)

(Testimony of Sally Kaye.)

Q. By Mr. Raskoff: After sending that letter, Exhibit B, did you receive a reply from the O.P. A., Mrs. Kaye? A. Yes.

Q. I show you a carbon copy of a document which is addressed to you and ask you if that is the reply you received? A. Yes, it is.

Mr. Raskoff: Again, your Honor, this is part of the Government file. May I read it into the record?

The Court: Yes.

(Mr. Raskoff reading.)

"In accordance with your request of June 12th, 1947 we are enclosing herewith Forms D-9 and D-9-A. As instructed in Form D-9-A a certified check must be submitted made out in the amount of the refund due each tenant, made payable to the United States Treasury." [35]

Q. Did you reply to that notification, Mrs. Kaye? A. I don't think I did.

Q. Did you fill out the forms and send the check to the O.P.A.?

A. I could not, no. I did not have the money or any part of it.

Q. Did you receive any rent from Mrs. Mailo, for the period from May 23rd, 1947 to June 7, 1947?

A. No, I did not. She told me the O.P.A. wrote her that I was to deduct that from the amount I owed her in the refund, along with the amount of twenty-six and some odd dollars for the telephone bill. Over the phone that was.

Mr. Raskoff: If your Honor please, the Court

(Testimony of Sally Kaye.)

has already made its view on the next line of inquiry. I would merely like to make an offer of proof.

The Court: I don't like offers of proof. Ask the question.

Q. By Mr. Raskoff: Mrs. Kaye, upon the termination of Miss Mailo's tenancy, after she moved out, how much money did you have to spend to restore the premises to the condition in which they were when they were rented?

Mr. Hirst: To which we object for the reasons already stated.

The Court: I will overrule the objection. It is not permissible, but I will put it into the record. You may [36] answer.

A. I would like to preface my statement—

The Court: No.

A. The repairs are still not made in full. I have not been able to make them in full.

Q. By Mr. Raskoff: How much money did you spend making repairs?

A. I have actually paid out about \$350.00.

Q. Can you itemize that? A. Yes, I can.

The Court: No, unless counsel wants it itemized. I don't think it should be itemized. It is not material. I am letting you have it for the record. May I say off the record—

(Off the record.)

Mr. Raskoff: No further questions. You may cross examine.

(Testimony of Sally Kaye.)

Cross Examination

By Mr. Hirst:

Q. You state that you first wrote the O.P.A. in Santa Ana asking for forms which you received back two or three days later, and that you filled these forms out. You testified also that you mailed the entire set to the office and that you did not retain the landlord's copy but that you made a copy yourself. Is that it? [37]

A. That's the original registration.

Q. Yes. A. That's right.

Q. Did you ever receive back a landlord's copy of that registration?

A. The original registration?

Q. Yes. A. No, I didn't.

Q. You knew, didn't you, that in the ordinary course of processing the registration, you would have received that back, did you not?

A. No, I did not.

Q. Did you ever make any further inquiry from the 15th of October or shortly thereafter, when you filed the registration, whether it had been accepted by the office or not?

A. No, I took it for granted it was all right because I did not hear from them.

Q. After your letter addressed to the Office of Price Administration, so far as the registration forms which you sent them were concerned, how did you address the envelope, do you recall?

A. Yes, O. P. A., Santa Ana, Cal. After that

(Testimony of Sally Kaye.)

I addressed all communications just as they were at the left of the envelope with the stamp, and I think it said Area Office, Price Control, Rental Administration, with the address. [38]

Q. You testified that shortly after the receipt of this order on or about May 7th, 1947 you wrote the office a letter, is that true? A. Yes.

Q. You received back a reply from the office, I believe enclosing forms and calling your attention to the necessity of submitting refund checks?

A. That is right.

Q. You made no reply to that, and stated that you were unable to make the refund?

A. I did not send the money. I did not have it. I did not fill it out.

Q. Subsequent to that time you have received, have you not, communications from the office with reference to the payment of the refund?

A. No.

Q. No inquiry and no demands have been made on you to make the refund?

A. To my knowledge that was the last communication I had from them. I am practically positive. It was just as school was out and I was in Laguna the last time I heard from them. That's why I remember.

Q. Mrs. Kaye, on or about August 12th, where did you receive your mail on or about that date, the box number?

A. Box 75, Laguna Beach, California. Then I had the [39] mail forwarded from October 26th.

(Testimony of Sally Kaye.)

The Oxnard Union High School sent my mail which went to 469 Poplar, but all O.P.A. communications, I asked them to send to the High School.

Q. I show a registered letter No. 20346, stamped August 12, 1947, which has never been opened.

A. I have never seen it.

Q. I call your attention to the initials and to the address Unit 6, Block 2, Oxnard. Was that your permanent address at that time?

A. Wait a minute, because I don't think that was the address. I moved out of the address at that time.

The Court: The question is whether you saw that letter.

The Witness: I have never seen it.

Q. By Mr. Hirst: You notice there is a pencil notation made of Box 75, Laguna Beach. That was your box at that time?

A. What is the date?

Q. August 12, 1947.

A. Yes. It was not in Laguna.

Q. The notation is made: Notified 8-8-47 to 8-14-47. Isn't it a fact that you were notified by the Post Office that there was a registered letter waiting to be picked up and you did not call for it?

A. No, I got no mail at the Post Office. As I remember I was not in Laguna then. I was gone about two weeks until [40] about the middle of August, and the mail placed in my box, other people got the mail. I couldn't say that there never was such a registration.

(Testimony of Sally Kaye.)

Q. Neither you or anyone on your behalf has ever claimed that letter?

A. Not to my knowledge, no.

The Court: All right. Step down.

PETER KAYE,

a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Peter Kaye.

Direct Examination

By Mr. Raskoff:

Q. What is your relationship to the defendant, Mrs. Sally Kaye? A. I am her son.

Q. Did you arrange with Miss Mailo, as real estate agent for the rental of these premises?

A. Yes, I did.

Q. How much money was paid you for the first month's rent, Mr. Kaye?

A. I got, as I remember it, \$90.00. The total check [41] was \$150.00, and the real estate office took 5 per cent of the total rent for the commission and I got what was left.

Q. That was your real estate agent?

A. Yes.

Q. Mr. Kaye, do you know how much money was spent in restoring the property to the condition it was at the time it was first rented?

A. Approximately, yes.

Q. How much was it?

(Testimony of Peter Kaye.)

Mr. Hirst: I object to that for the same reasons.

The Court: Overruled.

Q. By Mr. Raskoff: How much money was spent in restoring the property to its condition?

A. I would say not less than \$300.

Mr. Raskoff: No further questions.

The Court: Step down.

Mr. Raskoff: That is the defendant's case.

The Court: Any rebuttal?

Mr. Hirst: There could be plenty of rebuttal on the question of damage to the property. I took the position that it was entirely immaterial in this proceeding, so I am not going to ask any questions.

The Court: All right.

Mr. Hirst: This case is basically a very simple set of facts. It is the common type of case that the Office of [42] Housing Expediter brings into court. We have here a situation where a registration is filed by a landlord designating a certain rental which he is charging. The Office of Housing Expediter, through the Director, is empowered to process that registration, either to approve it or, if he determines that the rent that is being charged is excessive, he can take the necessary steps to reduce it.

The Court: Except in cases where the property was not rented during the preceding year, in which event it does not control.

Mr. Hirst: You are referring now to the provisions of the Housing Act of 1947.

The Court: Yes.

Mr. Hirst: There are certain exceptions, but

they are not applicable to this case, because all the base rent took place back in 1946, and the Housing Rental Act has no application to these facts.

Now the evidence of the Office of Housing Expediter shows a registration filed February 21st, 1947. There is no record of any prior registration, regardless of the defendant's testimony, and the record further shows that the Director did not agree with the landlord in her statement of the rent, and he took the necessary steps to reduce it, and in May, 1947, there was issued an order which has been introduced in evidence as Plaintiff's Exhibit No. 2, reducing it [43] from \$150.00 per month to \$75.00 per month, and indicated that the order was retroactive in effect back to the beginning date when the property was first rented, namely, September 23rd, 1946.

The evidence further shows that the defendant never made a refund pursuant to the order of the Director requiring a refund to be made within 30 days after the issuance of the order.

That no proper proceedings for the stay of the effect of the order were ever initiated, so the order was in full force and effect and binding on the defendant from the time it was issued. The defendant is therefore in violation of the law for failure to refund, and that is the basis of the plaintiff's action.

The Court: I am interested in just one thing. Doesn't the statute say that if the property never had been rented during the year preceding the enactment of the new law that it is not subject to control?

Mr. Hirst: The order was made before the Housing and Rent Act of 1947 came into existence.

The Court: But you are bringing the lawsuit now to collect it.

Mr. Hirst: But it is brought on the law in effect at the time.

The Court: You are bringing the lawsuit now. Therefore [44] when the 1947 Act said that any housing accommodation which was not used for one year prior to the enactment of the Act was not subject to the control, they have a right to be retroactive just as much as I have.

Mr. Hirst: I disagree with your Honor. The law becomes effective as of the date of the enactment.

The Court: The Congress has said that any housing accommodation which was not rented for one year prior to this was not subject to control. The mere fact that you made an order does not repeal the act of Congress. Congress has made it retroactive, just as they do in taxes. They can make a tax retroactive as of three or four months or six months or a year before.

Mr. Hirst: But I think we are on a point that cannot be made an issue. This property was rented within the last year prior to the Housing Rent Act. It shows that in September, 1946 the property was rented to Miss Ann Mailo. There is no applicable provision that would apply here.

The Court: You did not bring this suit until the new Act went into effect in November, 1947.

Mr. Hirst: This property does not come under any provision of the Housing and Rent Act of 1947.

The Court: What is the Housing Act? Let us see what it says. You read it.

Mr. Hirst: Here it is. I will first indicate—

The Court: Give the date of the Act.

Mr. Hirst: I was reading now from the regulation.

The Court: Give me the date of the Act first.

Mr. Hirst: The date of the Act, your Honor, is not indicated here, but I state to the Court that it became effective July 1st, 1947.

I can't, just by glancing through this particular copy, see the provision. This Act, as we know, made certain exemptions, and held within its control what they call the housing accommodation. This is a pertinent subdivision. Section 202, Subdivision (c)-(3). "any housing accommodation"—these are the exemptions—"any housing accommodations (A) the construction of which was completed—

The Court: No, read it through, please.

Mr. Hirst: (B) "which at no time"—this is the exemption "which at no time during the period February 1, 1945 to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant, as housing accommodation."

That is the situation, which was not rented from February, 1945 to January, 1947. The case before the Court involves the rent during that very period.

Now, your Honor, the action of the Director—the order was issued as testified to. It has been introduced in evidence. It was issued by the Area Rent Director. I can cite [46] a number of cases

in court where it held that the exclusive jurisdictional clause of the Emergency Price Control Act, which was the Act in effect at the time of this order, Section 204 (d) confers upon the Emergency Court of Appeal exclusive jurisdiction to pass upon the validity or the invalidity of the order, on the regulation upon the terms of that Act. That provision has been upheld by the decisions of the Supreme Court of the United States, the basic decisions of which your Honor is familiar, *Yakus v. U. S.*, 321 U. S. 414; *Bowles v. Willingham*, 320 U. S. 503.

And as a matter of fact, following the jurisdiction that was conferred upon the Emergency Court of Appeal, they have taken jurisdiction under that provision to determine protest proceedings involving individual orders directing reduction of rent and have upheld them and rejected them, depending upon the merits of the case. 146 Fed. 2d, 1947.

The Court: I know that.

Mr. Hirst: We cannot short circuit that exclusive jurisdictional provision and come into this court and go behind the order itself and seek to declare it invalid because there is no jurisdiction for that purpose here. We must take the order, after we have established the due execution of the order, and give full effect to that order.

Mr. Raskoff: If your Honor please, I have read the Supreme Court decisions which counsel cites, and as a matter [47] of fact they expressly reserve opinion on the question of whether or not an order is void on its face, and can be so declared by the

trial court. In the first case (*Yakus v. United States*, 321 U. S. 414), when this matter was before the Supreme Court, Mr. Justice Stone writing the majority opinion in that case held that the District Court had no right to go behind the order, and goes on to say:

“There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had no opportunity—”

The Court: We are not talking about a criminal case.

Mr. Raskoff: I was merely pointing out that it did reserve the question.

In the case of *Bowles v. Willingham*, 321 U. S. 503, the Court held in that case that the Court cannot go behind the order, and Mr. Justice Rutledge writing the concurring opinion pointed out at that time that there were no constitutional denial of rights in that case. He says:

“In my opinion Congress can do this, subject, however to the following limitations or reservations, [48] which I think should be stated explicitly:

“(1) The Order or regulation must not be invalid on its face;

“(2) the previous opportunity must be adequate for the purpose prescribed in the constitutional

sense;”— That language is taken from the opinion of Mr. Justice Stone in the other case. This is a civil case.

“and (3), what is a corollary of the second limitation or implicit in it, the circumstances and nature of the substantive problem dealt with by the legislation must be such that they justify both the creation of the special remedy and the requirement that it be followed to the exclusion of others normally available.”

It is our contention, your Honor, that the Supreme Court has not indicated that the trial court would be prohibited from going behind the order, and the evidence is undisputed, that this housing accommodation was registered by the very regulation that authorized this order. We contend, on the undisputed evidence in this case, that the defendant filed a registration within the 30 days and that this order on its face appears to have been issued after the 30 days. On that basis by the very regulation under which this order purports to get its authority, the order is invalid.

And the second ground on which we contend the order is [49] invalid is on the basis that this Court is authorized to inquire, under the Supreme Court decision and under that the defendant in this case did everything she could do to appeal this order. She did not have any money and there was no way in which any avenue was open to test the validity of the order. We submit that on these facts this procedure would be a denial of the constitutional rights on the part of the defendant because no avenue was open to her to test the validity of this order.

The Court: The courts have repeatedly held that inability to furnish the cost of appeal is not a denial. They are out of luck.

Mr. Raskoff: The Supreme Court states in this opinion that the opportunity to be heard must be adequate.

The Court: It was adequate, because she knew about it. The mere fact that she did not have the money to appeal does not mean anything. She can still appeal in *forma pauperis*, which is granted in both civil and criminal cases.

Mr. Raskoff: The last point I would like to make, with the Court's permission, is the point I started to develop earlier, and that is that the order on its face is invalid because it is an order of the Office of Temporary Control, and I contend that the statute itself is clear on that point.

The Court: There is no use of wasting time on that. [50] I have ruled the other way fifty times.

Mr. Raskoff: In rent cases?

The Court: Yes. The Supreme Court has so ruled and the Circuit Court has so ruled.

Mr. Raskoff: I will respect your Honor's wishes.

The Court: Anything relating to the constitutionality of the Act is out, because I have ruled so often it is a waste of time to argue.

Mr. Raskoff: In conclusion I want to say that the record in this case is clear that there was no attempt, and the Government does not contend that there was any attempt, to conceal the amount of rent. The rent was disclosed *ab initio*, and the only point is whether the defendant can be obli-

gated to pay the amount because the order was not issued within the 30 days of the rent order and it is invalid on its face.

Mr. Hirst: If you look at the order within its four corners it is not invalid on its face.

The Court: The regulation—

Mr. Hirst: The order is what I am referring to.

The Court: But you have got to go by the regulation. It is undisputed that this property was never rented before, and the only registration was the registration which you have in evidence and that is dated February 21, 1947.

Mr. Hirst: Yes, your Honor, but the basis of liability [51] is predicated upon the order subsequently issued.

The Court: But if it appears upon its face that the order was issued after the time for modifying the order, to make it retroactive, it was invalid.

Mr. Hirst: But you have to go behind that.

The Court: If you kick out No. 1 you have no regulation at all.

Mr. Hirst: You don't need any regulation.

The Court: No, that is not my view of the law.

Mr. Hirst: Besides that, your Honor, the evidence, as counsel says, is undisputed, but it is very definitely disputed. There was a prior registration.

The Court: There never was any prior occupancy by anybody.

Mr. Hirst: I am talking about the registration by the landlord.

The Court: Who?

Mr. Hirst: The defendant in the case, Mrs. Kaye.

The Court: There is no showing that the property was occupied by anybody else before that time.

Mr. Hirst: I am not trying to show that, your Honor. This property was rented September 23rd, 1946, let us assume, for the first time. The registration for that property hadn't been recorded with the Housing Act Expediter, it was not filed until February 21, 1947. That was a date [52] of registration, previous to the 30-day period, and the Director was entitled under the Act to make such an order and to make it retroactive.

The Court: You will have to convince the Circuit Court of Appeals. I hold that this property was not occupied before this registration, so far as the evidence in this court shows. At the most you would be entitled to a refund of \$300.00, but I won't even give you that, because it appears that this property was not occupied before, so far as the evidence is concerned. That at the time the action was brought the Congress had passed a law stating that property which had not been occupied for a year preceding July 1st, 1947 is not subject to the regulation.

I hold that the property, never having been occupied before, the regulation stated the period during which the Director could issue an order making it retroactive, but he could not issue an order after the period stated in the regulation, when the evidence shows the property was never occupied before.

Therefore the order issued on May 19, 1947, was invalid on its face, and this court declares that an order which is invalid on its face has no validity at

all. And I may say that this is another one of the cases where the persons occupying the premises conclude to enrich themselves at the expense of the landlord, and I do not approve of that, and [53] I do not believe that such an action should be brought.

Judgment will be for the defendant, on the ground that the order is absolutely invalid on its face, because it was issued after the expiration of the 30 days, and no administrative finality attaches to an order invalid on its face. It is apparent that the registration was made at a certain time and that the Office of Price Administration had 30 days in which to make this order, and this was beyond that period.

Therefore the judgment will be for the defendant.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of August, A.D., 1948.

s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed Aug. 30, 1948.

[Endorsed]: No. 12029. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Sally Kaye, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 1, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12029

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

SALLY KAYE,

Defendant.

DOCUMENT ADOPTING STATEMENT OF
POINTS

To: Clerk of the Circuit Court of Appeals for the
Ninth Circuit.

Sir: Pursuant to subdivision 6 of Rule 19, Tighe
E. Woods, Housing Expediter, appellant herein,
adopts as his points on appeal, the statement of
points appearing in the transcript of record.

Respectfully submitted,

/s/ ED DUPREE,
General Counsel.

/s/ HUGO V. PRUCHA,
Assistant General Counsel.

NATHAN SIEGEL,
Special Litigation Attorney.

Office of the Housing Expediter, Office of the Gen-
eral Counsel, 4th and Adams Drive, S.W., Wash-
ington 25, D. C.

[Endorsed]: Filed September 20, 1948. Paul P.
O'Brien, Clerk.

No. 12029

**In the United States Court of Appeals for the
Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

SALLY KAYE, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

APPELLANT'S BRIEF

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

ISADORE A. HONIG,

Special Litigation Attorney,

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In the United States Court of Appeals for the Ninth Circuit

No. 12029

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

SALLY KAYE, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Housing Expediter appeals from a final judgment of the United States District Court for the Southern District of California, Central Division, entered on April 20, 1948, dismissing an action brought pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Sec. 925 (a)) for violations of the Rent Regulation for Housing (10 F. R. 13528) and Section 206 of the Housing and Rent Act of 1947 for violations of the Rent Regulation issued thereunder (12 F. R. 4331). Notice of Appeal was filed on May 17, 1948 (R. 43). Jurisdiction of the District Court was invoked under

Section 205 (c) of the Emergency Price Control Act, as amended ¹ (R. 2) and Section 206 (b) of The Housing and Rent Act of 1947 ² (R. 6). Jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. 225).

STATEMENT OF THE CASE

The appeal presents the substantial question whether under the Emergency Price Control Act, as amended, a District Court is empowered to consider the validity of a rent-reduction order requiring refund of overcharges by a landlord to a tenant, on the ground that it is invalid on its face.

A further question is whether the mailing of a registration statement by a landlord constitutes the "filing" of such document with the Area rent office within the meaning of Section 7 (a) of the Rent Regulation for Housing (p. 25, *infra*).

The essential facts in the case are the following:

The defendant below, Mrs. Sally Kaye (appellee and hereinafter called the "defendant"), is the owner of a house located at 469 Poplar Street, Laguna Beach, California, within the Los Angeles Defense-Rental Area (R. 53, 54). These housing accommodations of the defendant were subject to the Emergency Price Control Act, as amended (50 U. S. C. App. Sec. 901, et seq.) and the Rent Regulation for Housing (10 F. R. 13528) issued thereunder (R. 3).

¹ The Emergency Price Control Act, as amended, is hereinafter referred to as the "Act."

² The Housing and Rent Act of 1947 is hereinafter referred to as the "Act of 1947."

The defendant leased the premises through the agency of her son, Peter Kaye, to a tenant, Ann Mailo, for the period from September 23, 1946, to June 1, 1947 (R. 64). In accordance with the lease agreement (R. 29), the tenant paid a monthly rental of \$150 (R. 64). The leasing of the house to the tenant, Mailo, was the first renting of her property by the defendant (R. 70). Under the provisions of Section 4 (e) of the Regulation (p. 23, *infra*), the defendant was required to register her accommodations with the area rent office within 30 days after renting them. Section 4 (e) further provided that if the landlord failed to file a proper registration statement within the required 30 days, the rent received was subject to refund to the tenant of any amount in excess of the maximum rent which might later be established under Section 5 (c) (1) of the Regulation.

Section 5 (c) (1) of the Regulation (p. 25, *infra*) provided that the Area Rent Director could order a decrease in the maximum rent registered by the landlord upon a first renting on the ground that this rent was higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1942. Under Section 4 (e) of the Regulation, the decrease could be made retroactive to the commencement of the rental period if the landlord was at fault in failing to file registration of the rental within 30 days after renting. This Section provided also that the landlord would have the duty to refund under the retroactive order only

if the order was issued in a proceeding commenced by the Area Rent Director within three months after the date of filing of a registration statement.

The defendant contended that she mailed the required registration forms reporting the rental of her property to the Santa Ana Office of the Los Angeles Area on about October 17, 1946, which was within 30 days after the renting (R. 73). Nevertheless, the files of the Santa Ana Area Rent Director contained no record as to the filing of such registration with that office (R. 62). In January, 1947 the defendant was informed that the records of the Area Rent Office did not contain a registration of her house (R. 62-63). On February 21, 1947, a registration statement of the renting of defendant's house at \$150 per month was filed with the Area Rent Office by the defendant (R. 26, 54). On May 19, 1947, the Area Rent Director issued an order pursuant to Section 5 (c) (1) of the Rent Regulation reducing the maximum rent on defendant's house from \$150 to \$75 per month, effective from September 23, 1946 (R. 2). This order also directed the defendant to refund to the tenant the overcharges received since September 23, 1946 (R. 27-28). The defendant did not refund the overcharges as required under the order issued by the Area Rent Director (R. 85).

The Housing Expediter (appellant and hereinafter called the "plaintiff") therefore instituted this action on November 13, 1947 (R. 6). The plaintiff sought restitution to the tenant of the overcharges pursuant to Section 205 (a) of the "Act" (p. 22, *infra*) as well as an injunction against violations of the Rent Regula-

tions issued under the Act of 1947 (R. 5, 6). The case was tried without a jury on March 18, 1948 (R. 20).

The Trial Court found that the tenant had paid a rent of \$150 per month from September 23, 1946, to May 23, 1947 (R. 22-23), and further found that the Area Rent Director had issued a retroactive order reducing the rent from \$150 to \$75 per month (R. 23). Nevertheless, the Court held that the rent reduction order was "invalid on its face" with respect to its retroactive application (R. 24). This ruling was apparently based on a finding that within 30 days after defendant's house was first rented, the defendant "duly filed" a registration statement (R. 23). The Court below rendered judgment for the defendant (R. 25), and it is from such judgment that plaintiff appeals (R. 43).

SPECIFICATION OF ERRORS

1. The Court erred in refusing to accept the Rent Reduction Order of the Area Rent Director, dated May 19, 1947, as valid and binding for all purposes and in all respects in the proceedings before it.

2. The Court erred in considering the validity of said Area Rent Director's Order contrary to Section 204 (d) of the Emergency Price Control Act of 1942, as amended.

3. The Court erred in holding that said Rent Reduction Order was invalid on its face.

4. The Court erred in holding that the violations alleged in the Complaint were not established and in refusing to grant judgment in favor of the plaintiff, as prayed for in the Complaint.

ARGUMENT

I

The Court below erred in failing and refusing to accept the rent reduction order of the Area Rent Director as valid and binding for all purposes and in all respects in the proceedings before it

A. Section 204 (d) of the Act divests a District Court of any jurisdiction to consider the validity of a rent order

Plaintiff introduced in evidence as Plaintiff's Exhibit Number 2 (R. 56) an order issued by the Los Angeles Area Rent Director which established the maximum rent for defendant's house as \$75.00 per month, effective from September 23, 1946 (R. 27-28). This order further directed the defendant to refund to the tenant any rent in excess of \$75.00 per month collected from September 23, 1946 (R. 28). The Court below held that this order was "invalid on its face with respect to its purported retroactive application" and in effect refused to accept the order as binding on the court with respect to the proceedings before it (R. 24). In thus failing to give full effect to the order of the Rent Director, the trial Court was clearly ignoring the mandate of Section 204 (d) of the Act (p. 22, *infra*). That Section provides that no Federal district court shall have jurisdiction to consider the validity of any order or of any provisions of an order issued under the Act. It is explicitly stated in Section 204 (d) that "The Emergency Court of Appeals * * * shall have exclusive jurisdiction to determine the validity of any regulation or order issued" under the Act, and of any provision of any such regulation or order.

That a District Court may not question the validity of a rent order was conclusively enunciated by the Supreme Court in *Woods v. Stone*, 68 S. Ct. 624. There, as in the case at bar, an order had been issued by an Area Rent Director reducing the maximum rental, effective from the commencement of renting, and ordering the refund of overcharges. The Housing Expediter brought suit for statutory damages for the overcharges. As the Supreme Court stated:

No question is raised, and none could have been raised in this proceeding, as to the validity of the relevant regulations and the refund order, either on the ground of retroactivity *or otherwise*, because any challenge to the validity of either would have to go to the Emergency Court of Appeals (68 S. Ct. at p. 625). [Italics supplied.]

The Supreme Court further remarked in that case:

As we have pointed out, the *validity* of the regulation *and order* are conclusive upon us here (at p. 627). [Italics supplied.]

This Court, in *Fleming v. Dashiell*, 161 F. 2d 612 (C. C. A. 9th), has likewise declared that a District Court is without authority under the Act to inquire into the validity of an order issued in the administration of the Act. In holding that a District Court was without authority to inquire into the circumstances of the making of a price fixing order, this Court stated:

It is equally clear that where an order upon its face is clearly applicable, any failure by the district court to enforce it is in legal effect the equivalent of declaring the order invalid.

This the District Court had no power to do (footnote 2, 161 F. 2d at p. 613).

(See also, *Bowles v. Wheeler*, 152 F. 2d 34 (C. C. A. 9th).)

In *Woods v. Bobbitt*, 165 F. 2d 673, 675 (C. C. A. 4th), the District Court held that an order of a Rent Director reducing rent was void since no affidavit of mailing the order in question was made or placed in the files of the Rent Director's office, as required by the Rent Procedural Regulation No. 3. The lower Court ruled that under the circumstances, the District Court had authority to consider the validity of the rent reduction order, and that the exclusive jurisdiction of the Emergency Court of Appeals under Section 204 (d) of the Act did not attach. On appeal, the Fourth Circuit Court reversed, holding that "the United States District Courts have no power to consider the validity of a rent reduction order and this is true even though the claim is made that the person affected has been denied due process or that the order is *void ab initio*" (at p. 675). [Italics supplied.]

In *Bowles v. Lake Lucerne Plaza*, 148 F. 2d 967, certiorari denied, 66 S. Ct. 31, the Fifth Circuit Court said:

But neither this court nor the court below has jurisdiction to consider the validity, the inconsistency, or the arbitrariness of administrative orders. Appellee's remedy was in the Emergency Court. Neither this court nor the court below can set aside or modify the orders of the Rent Director or the orders of the Administrator. We can only construe and enforce them (at p. 970).

In *Elma Realty Co. v. Woods*, 169 F. 2d 172 (C. C. A. 1st), the defendant-landlord contended that the Rent Director's orders reducing the maximum rents on apartments rendered uninhabitable by fire, to \$1.00 per week, were invalid and void. It was asserted by the defendant that the apartments obviously had no rental value at all. The First Circuit Court, in upholding the ruling of the District Court, which gave effect to the challenged rent orders, stated:

The appellant's primary contention that the Rent Director had no authority under either the statute or the regulations to issue the orders reducing the rents after the fire to \$1.00 per week for each apartment constitutes clearly a direct attack on the validity of the orders themselves. Thus the contention is one to be made in appropriate proceedings in the Emergency Court of Appeals established by § 204 (c) of the Emergency Price Control Act of 1942, since § 204 (d) of the Act not only gives that court, and the Supreme Court upon review of its judgments and orders, "exclusive jurisdiction to determine the validity of any regulation or order issued under section 2" but also provides that except for the Supreme Court's power of review "no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order * * *" (at p. 173).

In *United States v. Tattleff*, 155 F. 2d 27 (C. C. A. 2d), certiorari denied, 66 S. Ct. 1374, defendant urged that Revised Maximum Price Regulation No. 169 was void "on its face" because it lacked the prior approval of the Secretary of Agriculture as was required

by Section 3 (e) of the Act. Rejecting this contention as untenable, the court held that this too was a matter reserved to the Emergency Court of Appeals by Section 204 (d) of the Act (see also, *Fleming v. Phoenix Chair Co.*, 168 F. 2d 3 (C. C. A. 7th); *Woods v. Hills*, 334 U. S. 210).

Thus by the numerous decisions of the Supreme Court and of this and other circuits courts, it is firmly established that, whatever the ground of invalidity asserted, it is not within the province of the District Court to deny validity to an order of an Area Rent Director since that is a matter reserved exclusively for the consideration of the Emergency Court.

B. In any event, the Court below erred in concluding that the rent reduction order was invalid on its face

The trial Court held that the rent reduction order issued by the Area Rent Director on May 19, 1947, was "invalid on its face with respect to its retroactive application" (R. 24). While the plaintiff submits that the District Court was without authority to inquire into the validity of a rent reduction order, the plaintiff contends that in any event, the order issued in this case was not invalid on its face, and the ruling of the trial Court to the contrary was clearly erroneous. There was nothing within the four corners of the order itself (See Plaintiff's Exhibit No. 2, R. 27-28) which in any way suggested that the order might be other than valid. Indeed, it was only by consideration of evidence outside the order that the trial Court was able to arrive at the erroneous conclusion that this order was invalid. On the trial, the lower Court stated

that "the order is absolutely invalid on its fact because it was issued after the expiration of the 30 days, * * *. It is apparent that the registration was made at a certain time and that the Office of Price Administration had 30 days in which to make this order, and this was beyond that period" (R. 98). These facts, as to the time of registration, and that the rent reduction order requiring refund of overcharges was issued more than thirty days after such registration, were obviously not matters ascertainable from the face of the order.

In *Rosensweig v. United States*, 144 F. 2d 30 (C. C. A. 9th), the defendants contended that the particular maximum price regulation for violation of which they were convicted, had not been approved by the Secretary of Agriculture as required in Section 3 (e) of the Act. This Court, in affirming the judgments sentencing the defendants, pointed out that there was nothing on the face of the pertinent regulation to indicate the Secretary of Agriculture had not approved it. This Court then proceeded to hold that the contention of the defendants constituted a claim that the Regulation was invalid, which neither this Court nor the District Court had jurisdiction to consider (at p. 30). See also, *Shrier v. United States*, 149 F. 2d 606, 608 (C. C. A. 6th). Similarly, in the case at bar there is nothing in the rent reduction order itself which would indicate that it was not issued within the required time after the premises of the defendant were first registered.

The Court below purported to base its holding that the rent reduction order dated May 19, 1947 (R. 27-

28) was invalid on its face on the ground that the order “was expressly conditioned” upon the limitation contained in Section 4 (e) of the Regulation (R. 24). Apparently, the Court was thus saying that the limitation on the issuance of an order of refund contained in Section 4 (e) of the Regulation³ (*infra*, p. 23) was incorporated by reference in the rent order. However, even if the provisions of Section 4 (e) which authorized the issuance of a refund order only where the first rental was not reported in thirty days after renting had been expressly set forth in the order itself, there would have been nothing added to that document to establish its putative invalidity.

In the light of the foregoing discussion, it is clear that the holding of the Court below that the rent reduction order was invalid on its face was neither warranted by the facts in this case, nor by the authorities cited which indicate that the claim of invalidating circumstances outside an order does not render the order “invalid on its face.”

C. The trial Court clearly erred in finding that the defendant “duly filed” a registration statement within thirty days after the defendant’s accommodations were first rented

The trial Court found that the defendant had duly filed a registration statement within thirty days after the defendant’s accommodations were first rented (R. 23). The Court below also found that the rent

³ The limitation on the issuance of a refund order contained in Section 4 (e) of the Regulation was the provision that such an order could be issued only in the event of the failure of the landlord to file a proper registration statement within thirty days of renting of the premises.

reduction order indicated that it was made retroactive to September 23, 1946, on the ground that the defendant had failed to file a registration statement within thirty days of the first renting of defendant's accommodations (R. 23). The finding that there was a registration statement "duly filed" within thirty days of the rental is not supported by the evidence in the record. At most, the evidence as to registration only showed that the defendant had mailed the required registration forms to the Area Rent Office (R. 73). The defendant offered no evidence that the registration was received by the Area Rent Office. The evidence introduced by the plaintiff indicated, on the contrary, that no registration was received by the Area Rent Office from the defendant in October 1946 (R. 54, 60).

Since there was no evidence in the record that a registration statement for defendant's house was received by the area rent office in October 1946, it is apparent that the trial Court took the view that under the Rent Regulation a registration was effected by merely depositing the required registration forms in the mail. The requirements for a proper filing of a registration under the Rent Regulation were prescribed in Section 1300.251 of Revised Procedural Regulation No. 3 of the Office of Price Administration, as amended March 1, 1945 (10 F. R. 2431), which provided as follows:

All notices, reports, registration statements, and other documents which a landlord is required to file, pursuant to the provisions of any maximum rent regulation, shall be filed with

the appropriate defense-rental area office and shall be deemed filed on the date received by said office unless otherwise provided in such maximum rent regulation or in this regulation: *Provided*, That any such notice, report, registration statement or other document properly addressed to and received by said office shall be deemed filed on the date of the postmark.

Therefore under the above-quoted provisions, there could be no registration "duly filed" unless the registration was actually received by the area rent office.

In *Park Management, Inc. v. Porter*, 157 F. 2d 688, the Emergency Court of Appeals considered the question whether mailing constituted the filing of a registration statement under a rent regulation of the Office of Price Administration. The Price Administrator had ruled that the mailing of a registration statement did not meet the requirement of "filing" such registration within the meaning of the rent regulation. In approving of the interpretation of the regulation made by the Price Administrator, the Emergency Court of Appeals said:

We are of the opinion that the Administrator's interpretation of the meaning of "filing," as used in the Regulation, is not unfair or arbitrary, and should be accepted. It is reasonably necessary to the administration of the Act and the regulations issued thereunder that documents and applications of persons which are required to be filed with the Office of Price Administration be placed in the hands of the proper officials thereof within the time provided. The effective operation of price and

rent control renders it necessary that all such documents actually be received by the proper officials of the Office of Price Administration rather than be merely deposited in the mails by the persons required to file them. The risk of loss and difficulties of proof are too great to permit mere posting to be sufficient (157 F. 2d at p. 689).

In *McRae v. Woods*, 165 F. 2d 790, the Emergency Court of Appeals denied the contention of a landlord that the verification of a complaint satisfied the statutory requirement of Section 204 (e) of the Act that the complaint be filed with that court within thirty days after leave granted. In that case the Court stated:

It is equally clear that a complaint is not filed, within the meaning of the act, until it is actually delivered to the Clerk for filing in his office. *United States v. Lombardo*, 1916, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897; *Lewis-Hall Iron Works v. Blair*, App. D. C., 1928, 23 F. 2d 972; *Stebbins' Estate v. Helvering*, App. D. C., 1941, 121 F. 2d 892. Indeed it has been held that the depositing of a paper in the post office is not sufficient to constitute a filing even though it be posted in time for it to reach the filing office in the usual course of the mails within the period allowed. *Poynor v. Commissioner of Internal Revenue*, 5 Cir., 1936, 81 F. 2d 521 (165 F. 2d at pp. 790-791).

The Supreme Court, in *United States v. Lombardo*, 241 U. S. 73, in holding that a document was not filed

as required by statute by the act of depositing in the Post Office, said:

The word "file" was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word "file" is derived from the Latin word "*filum*," and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. *Gates v. State*, 128 N. Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier Law Dictionary; *White v. Stark*, 134 California, 178; *Wescott v. Eccles*, 3 Utah, 258; *In re Van Varcke*, 94 Fed. Rep. 352; *Mutual Life Ins. Co. v. Phiney*, 76 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act (241 U. S. at pp. 76-77).

Since the finding of the trial Court as to the filing of the registration within thirty days of the renting has been shown to be "clearly erroneous," it is not binding on this Court (Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. following Sec. 723c)). It also follows that the conclusion of the Court below as to the invalidity of the rent order, which conclusion was expressly based on the erroneous finding as to timely filing of a registration (R. 24), was equally incorrect.

II

The trial Court erred in failing to grant judgment in favor of plaintiff, as prayed for in the complaint

A. The maximum rent for defendant's accommodation during the period involved in this case was \$75 per month

The trial Court held that the maximum rent for defendant's accommodation during the period involved in this case was \$150 per month (R. 24). Such conclusion was correct only if the retroactive rent reduction order issued May 19, 1947 (R. 27, 28) is to be deemed invalid. As plaintiff has demonstrated, the Court below had no jurisdiction under the Act to treat the order as being other than valid. Accordingly by the terms of the order which the trial Court was obliged to accept as valid for the purposes of these proceedings, the maximum legal rent for the defendant's accommodation was established as \$75 per month during the entire term of renting (R. 27-28). The Area Rent Director, in reducing the rent to the maximum rate of \$75 per month as of September 23, 1946, was acting pursuant to Section 5 (c) (1) of the Regulation (infra, p. 25) and Section 4 (e) of the Regulation (infra, p. 23) (R. 27). These sections authorized the Rent Director to order the reduction of a registered rent rate retroactive to the date of renting where the landlord had failed to file a registration statement within thirty days of the renting⁴ and where the order was issued pursuant to pro-

⁴ In *Dean et al. v. Woods*, No. 468, Emergency Court of Appeals, decided September 13, 1948 (not yet reported), the Emergency Court upheld the authority of a Rent Director under Section 5 (c) (1) of the Rent Regulation for Housing to issue a retroactive order requiring refund of overcharges where the landlord fails to file a proper registration statement within 30 days of the first renting (p. 3 of slip opinion).

ceedings commenced within three months after a registration was filed. Applying these provisions of the regulation to the facts in this case, it is clear that the action taken by the Rent Director in his order with respect to fixing a maximum rent of \$75 per month effective September 23, 1946, was unquestionably proper. As we have seen, the first registration for defendant's house was received by the area rent office on February 21, 1947 (R. 26), although the premises were rented commencing September 23, 1946 (R. 28). Following the receipt of defendant's registration on February 21, 1947, proceedings were commenced by the Area Rent Director on April 2, 1947 (R. 33), which culminated in the issuance on May 19, 1947, of the order establishing a maximum rent for defendant's premises of \$75 per month retroactive to September 23, 1946 (R. 27). As it thus appears that the Rent Director complied with the provisions of the Rent Regulation in establishing the maximum rental, the holding of the Court below that the maximum rent was different from that contained in the regularly issued rent order is patently indefensible.

B. Having found that the defendant received a monthly rate which was in excess of the maximum legal rent, the trial Court should have rendered judgment of restitution as prayed for by plaintiff

The trial Court found that the tenant was compelled to pay a monthly rent of \$150 for defendant's premises (R. 22). This rental rate involved an overcharge of \$75 per month inasmuch as the maximum rent prescribed by the Area Rent Director's order of May 19, 1947 was \$75 per month (R. 28). Although the trial Court thus found that the rent payments received by defendant were in excess of the maximum

rental prescribed by the Rent Director's order, that Court rendered judgment for the defendant. The trial Court's decision was erroneous and was induced by its mistaken holding that the order establishing the maximum rent was invalid. Plaintiff in his complaint sought restitution of the overcharges to the tenant in accordance with Section 205 (a) of the Act (*infra*, p. 22). As was pointed out by the Supreme Court in *Porter v. Warner Holding Company*, 328 U. S. 395:

The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. *Clark v. Smith*, 13 Pet. 195, 203. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums (at p. 400).

In the *Warner Holding Company* case, *supra*, where the district Court declined under an erroneous view of the law as to its jurisdiction to entertain the propriety of a restitution order, the Supreme Court remanded the case to the district court to exercise its authority with respect to the issue of restitution. In the case at bar the district Court similarly declined to consider whether a restitution order should issue,

and failed to consider plaintiff's prayer for such relief because of its erroneous application of the law to the rent order involved. It is submitted, therefore, that the action taken by the Supreme Court in the *Warner Holding Company* case, *supra*, in remanding should also be pursued by this Court.

In *Creedon v. Randolph*, 165 F. 2d 918, the Fifth Circuit reversed a judgment for defendant in a case where the district Court failed to exercise its jurisdiction with respect to restitution even though that Court was satisfied that rent overcharges had been received by the landlord. The appellate Court there said:

It [restitution] is a remedy which may be had in addition to the others set up in the Act, and an order of restitution may be granted with or without a prohibitory injunction. We find this view of the law abundantly sustained by the majority opinion and the decision of the court in *Porter, Adm'r. v. Warner Holding Co.*, 328 U. S. 395, 66 S. Ct. 1086, 1091, 90 L. Ed. 1332.

In that case there was a reversal, and a remand to the district court "So that it may exercise the discretion that belongs to it." We think that a proper disposition of this case (165 F. 2d at p. 920).

The above cited authorities clearly sustain plaintiff's contention that the trial Court was in error in having failed to award restitution under the circumstances in the case at bar wherein it was established that the defendant had received rent payments in excess of the applicable maximum rents for defendant's accommodations.

CONCLUSION

It is respectfully submitted that the judgment below be reversed and the cause remanded with instructions to the lower Court to enter judgment for plaintiff as prayed for in the complaint.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. *Emergency Price Control Act of 1942*, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Secs. 901 et seq.).

SECTION 204 (d). * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provisions of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

SEC. 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a per-

manent or temporary injunction, restraining order, or other order shall be granted without bond.

2. Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1881, et seq.):

SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204 or otherwise to do or omit to do any act in violation of any provision of this title.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

3. Rent Regulation for Housing (10 F. R. 13528):

SEC. 4. *Maximum rents.*—Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(e) *First rent after effective date.*—For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the

two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

If the landlord fails to file a proper registration statement within the time specified (except where a registration statement was filed prior to October 1, 1943) the rent received for any rental period commencing on or after the date of the first renting or October 1, 1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1). Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order. If the Administrator finds that the landlord was not at fault in failing to file a proper registration statement within the time specified, the order under section 5 (c) (1) may relieve the landlord of the duty to refund. Where a proper registration statement was filed before March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding commenced by the Administrator before September 1, 1945. Where a proper registration statement is filed on or after March 1, 1945, the landlord shall have the duty to refund only if the order under section 5 (c) (1) is issued in a proceeding commenced by the Administrator within three months after the date of filing of such registration statement. The foregoing provisions and any refund thereunder do not affect any civil or criminal lia-

bility provided by the act for failure to file the registration statement required by section 7.

SEC. 5. *Adjustments and other determinations.*—In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

(c) *Grounds for decrease of maximum rent.*—The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that:

(1) *Rent higher than rents generally prevailing.*—The maximum rent for housing accommodations under paragraph (c), (d), (e), (g), or (j) of section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date. * * *

SEC. 7. *Registration*—(a) *Registration statement.*—On or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit and shall contain such other information as the Administrator shall require. The original shall remain on file with the Administrator and he shall cause one copy to be delivered to the tenant and one copy, stamped to indicate that it is a correct copy of the original, to be returned to the landlord. In any subsequent change of tenancy the landlord shall exhibit to the new tenant his stamped copy of the registration statement, and shall obtain the tenant's signature and the date thereof, on the back of such statement. Within five days after renting

to a new tenant, the landlord shall file a notice on the form provided therefor, on which he shall obtain the tenant's signature, stating that there has been a change in tenancy, that the stamped copy of the registration statement has been exhibited to the new tenant and that the rent for such accommodations is in conformity therewith.

When the maximum rent is changed by order of the Administrator, the landlord shall deliver his stamped copy of the registration statement to the area rent office for appropriate action reflecting such change.

4. Revised Procedural Regulation No. 3 (10 F. R. 2431):

Section 1300.251. All notices, reports, registration statements, and other documents which a landlord is required to file, pursuant to the provisions of any maximum rent regulation, shall be filed with the appropriate defense-rental area office and shall be deemed filed on the date received by said office unless otherwise provided in such maximum rent regulation or in this regulation: *Provided*, that any such notice, report, registration statement or other document properly addressed to and received by said office shall be deemed filed on the date of the postmark.

5. RULE 52 (a). Federal Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c):

(a) *Effect*.—In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not neces-

sary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

No. 12029

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellant,

vs.

SALLY KAYE,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Sally Kaye, appellee herein, and in reply to the appellant's opening brief, respectfully states as follows:

Summary of Argument.

Appellant, the Housing Expediter, brought an action in the Court below to enjoin violations of the Housing and Rent Act and to compel the landlord to make restitution pursuant to an order of the Area Rent Director. There are two questions presented on this appeal. First, does the District Court have the power to determine whether or not the regulation, upon which the order was based,

applies to the appellee. If the answer to this question be in the affirmative, the remaining question is whether or not the finding of the Court below that the appellee had duly filed a registration statement within 30 days of the renting of the housing accommodation was clearly erroneous. The authorities hereinafter discussed fully support the decision of the Court below, and we submit that the judgment should be affirmed on the following grounds:

1. The trial court had the power and duty to determine the applicability to appellee of the refund order and the regulation on which it was based.

2. There was substantial evidence to support the finding that appellee had duly filed a Registration Statement within 30 days after the housing accommodations were first rented.

3. This being a proceeding in equity, the trial court had the discretion to determine whether an order for restitution was necessary or proper under the circumstances, and there has been no showing that the discretion was abused in the present case.

I.

The Trial Court Had the Power and Duty to Determine the Applicability to Appellee of the Refund Order and the Regulation on Which It Was Based.

At the outset appellee desires to make it clear that she does not now, nor did she in the trial court, attack the validity of the order in so far as it established the maximum rent for the housing accommodations in question from and after the date of said order. It is the appellee's position that the retroactive provisions of the order did not and could not apply to appellee for the reason that the section of the Rent Regulation upon which the said order was expressly based did not apply to appellee. It will be noted from the order itself [Tr. 27] that it was issued May 19, 1947; after providing that the maximum rent for the housing accommodations shall be decreased, it reads:

“For the reason stated in Section 4(e) of the Rent Regulation, the Maximum Rent so decreased and determined by this Order shall be effective from September 23, 1946.”

Section 4(e) of the Rent Regulation for Housing (10 F. R. 13528) which is reprinted in the appendix to appellant's brief on page 23 thereof, provides in so far as it is here relevant:

“If the landlord fails to file a proper registration statement within the time specified [30 days] . . . the rent received for any rental period commencing on or after the date of the first renting, or October 1, 1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under Section 5(c)(1).”

It should be noted that all of the rental payments here involved were made prior to the date of this order [Tr. 22].

While it is true, as appellant has pointed out, that only the Emergency Court of Appeals has jurisdiction to determine the validity of any regulation or order of the Housing Expediter, it is equally clear that only the enforcement Court can interpret and apply the order or regulation sought to be enforced. This principle as to the respective duties of the Emergency Court of Appeals and the District Courts has been recognized by this Court. Thus in *Fleming v. Dashiell* (C. C. A. 9th), 161 F. 2d 612, which is cited and quoted from on page 7 of appellant's opening brief, the Court states:

"It is equally clear that *where an order upon its face is clearly applicable*, any failure by the district court to enforce it is in legal effect the equivalent of declaring the order invalid." (Emphasis added.)

This is a clear recognition that the District Court can properly determine the applicability of an order. Similarly in the case of *Bowles v. Wheeler* (C. C. A. 9th), 152 F. 2d 34, (cited on page 8 of appellant's brief), this Court held that the Emergency Price Control Act and the regulations thereunder applied to the defendant in that case, but in so holding the Court stated that both the District Court and the Circuit Court, on appeal, should determine the application of the Act and the Regulations to the business of defendant where the defendant in an enforcement proceeding denied their application. After stating that the Court did not have power to consider the validity and

legality of the regulation, this Court stated (152 F. 2d at 37):

“It is, of course, the province and the duty of the court to determine for itself whether a defendant is within the coverage of the Act or Regulations, but in the determination of that question it is not competent for the court to consider the fairness or the equity of any regulation or price schedule established thereby.”

In that case the Court considered the applicability of the Act and the regulations to the defendant notwithstanding the fact that the regulation there in question specifically named the business operations there involved as being subject to the regulation. This is in accord with the decisions in other circuits, in the Emergency Court of Appeals, and in the Supreme Court.

In the case of *Bowles v. Griffin* (C. C. A. 5th), 151 F. 2d 458, a landlord was sued by his tenant for overcharges in rent, the tenant relying on a rent order of the Office of Price Administration reducing the rent on the premises in question retroactively. Notwithstanding the fact that O. P. A. had issued an order directed to the landlord reducing the rent retroactively, the landlord defended on the ground that there was a prior order of O. P. A. authorizing the rental that the tenant had paid. The O. P. A. intervened in the action and made the same contention that the Housing Expediter is making in the instant case, that is that the order reducing the rent retroactively was binding upon the District Court. In ruling against the contention of the O. P. A. in that case,

the Fifth Circuit used the following language which is particularly appropriate here:

“But the regulations and orders of the administrator are in their nature legislative and administrative and not judicial. The fact findings on which they are based do not constitute estoppel as by judgment. While the consideration of the validity of regulations and orders is reserved for the Emergency Court of Appeals, the application and enforcement of them is by Section 205 committed wholly to the district court, which has the jurisdiction to find the facts to which the regulations or orders are to be applied . . . Its [the district court’s] enquiry on these points cannot be cut off and foreclosed by fact findings of the Administrator.” (151 F. 2d at 460.)

The Court of Appeals for the District of Columbia reached a similar result in *In re Rice*, 165 F. 2d 617. In that case the Office of Price Administration had issued an order expressly purporting to cover the price to be charged for the rental of taxi cabs. Rice, the owner of taxi cabs who rented them to others for operation in the District of Columbia, appealed from an order of the District Court for the District of Columbia directing Rice to obey an administrative subpoena. The Court of Appeals reversed the order of the District Court on the ground that Rice was not subject to the Price Control Act, the Court stating at 165 F. 2d 620:

“We are here considering, however, not the validity of Regulation 571, but the coverage of the Price Control Act itself; for in the absence of coverage, the Regulation could not apply. It is one thing to invalidate a price regulation; that may be done only by the Emergency Court. It is quite a different thing to decide that a price regulation, valid when applic-

able, does not apply to an appellant who is a common carrier within the exemption of the statute. The latter action is, strictly speaking, not an invalidation of the regulation, but a determination that, because of the statutory exemption, the act does not cover the particular situation under consideration. *Farmers' Gin. Co. v. Hayes*, D. C., 54 F. Supp. 47, 55; *Bowles v. Nu Way Laundry Co.*, 10 Cir., 144 F. (2d) 741, 746, certiorari denied, 1945, 323 U. S. 791, 65 S. Ct., 431, 89 L. Ed. 631; *Bowles v. Wheeler*, 9 Cir., 152 F. (2d) 34, 37, certiorari denied, 1945, 326 U. S. 775, 66 S. Ct. 265, 90 L. Ed. 468."

The Emergency Court of Appeals has consistently held that only the enforcement court, that is the District Court, has the power to determine the interpretation or application of any order or regulation of the Housing Expediter and that the Emergency Court will not make such a determination unless it is necessary for a consideration of the validity of the order or regulation complained of.

Gordon v. Bowles, 153 F. 2d 614;

Collins v. Bowles, 152 F. 2d 760;

Conklin Pen Co. v. Bowles, 152 F. 2d 764;

Alan Levin Foundation v. Bowles, 152 F. 2d 467;

Chippewa County Co-Op. Dairy v. Clark, 163 F. 2d 753.

In the *Gordon* case first cited above, the complainant was seeking to have the validity of a certain price regulation and order determined. The complainant contended that the administrator erroneously included complainant in a certain category of retailers defined by the order and that in fact the complainant should have been included in another category. The Emergency Court of Appeals dismissed the complaint on the ground that the Emergency

Court of Appeals had no jurisdiction to determine the propriety of the classification complained of. In so holding the Court states (153 F. 2d at 615):

“In discussing this contention, we should bear in mind that with the propriety of complainant’s classification as such, involving, as it does, interpretation and application of the regulations to him, this court is not concerned. Those questions are left to the district court for determination in enforcement or declaratory action. (Citing cases.)”

The opinion is concluded as follows (153 F. 2d at 616):

“The propriety of the classification as a matter of fact and the interpretation of the regulation are questions for the enforcement court; as to them we refrain from gratuitous expression of opinion.”

The foregoing line of cases of the Emergency Court of Appeals has been approved by the United States Supreme Court. *Holland v. Porter* (1946), 328 U. S. 46, 66 Fed. Ct. 893.

On the basis of the foregoing authorities it seems clear that in the instant case the trial court, before enforcing the order, had the duty to determine whether or not the regulation, upon which it was on the face thereof expressly based, applied to the defendant. The applicability of that regulation depended upon a finding of fact as to whether or not the defendant had filed a Registration Statement within 30 days after the first renting of the housing accommodations in question. The Court found, and as we shall hereinafter demonstrate, upon substantial evidence that a registration was filed within 30 days after the first renting of the housing accommodations, and it therefore followed that the regulation authorizing a retroactive order was inapplicable to appellee.

II.

There Was Substantial Evidence to Support the Finding That Appellee Had Duly Filed a Registration Statement Within 30 Days After the Housing Accommodations Were First Rented.

The Court below found as a fact [Tr. 23] that “within 30 days after the said housing accommodations were first rented, to-wit, on or about the 20th day of October, 1496, the defendant, Sally Kaye, duly filed, in triplicate, a written statement on the form provided therefor, known as a registration statement, identifying the said housing accommodations and specifying a maximum rent therefor in the sum of One Hundred Fifty (\$150) dollars.” No citation of authority is necessary for the well established principle that findings of fact shall not be set aside unless clearly erroneous. Before calling attention to the evidence in the record supporting the above quoted finding we should like to make it clear that we are in full accord with the legal principles set forth on pages 12 to 16 of appellant’s opening brief to the effect that the word “file” means received and not mailed. The Court below, however, found as a fact that the registration statement was filed and it is appellee’s position that the evidence fully supports this finding.

It is undisputed that the premises were first rented on the date of the lease [Tr. 28] September 23, 1946. Appellee testified that on the 15th of October, 1946, she wrote a letter addressed to the O. P. A., Santa Ana, California, requesting a supply of registration blanks; that two days later she received from O. P. A. a set of registration forms and that on the same day she filled out the forms and returned them to the Office of Price Administration [Tr. 72, 73]. Appellee further testified that the informa-

tion contained on Plaintiff's Exhibit 1 [Tr. 27] which was the second registration statement filed by the appellee on February 21, 1947, was copied from a copy of the original registration which she had mailed to O. P. A. on October 20, 1946. On cross-examination appellee further testified in this connection that the original registration above referred to was mailed in an envelope addressed to O. P. A., Santa Ana, California [Tr. 84]. The only evidence in the entire record which can possibly be construed to be in conflict with the foregoing testimony of appellee is that the appellant's file did not contain a registration earlier than the registration introduced in evidence as Plaintiff's Exhibit 1 [Tr. 62].

The foregoing evidence substantially supports the finding that the registration had been filed or received. As stated by the United States Supreme Court in *Rosenthal v. Walker* (1883), 111 U. S. 185, 193, 4 S. Ct. 382:

"The rule is well settled that if a letter properly directed is either proved to have been put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, *and was received by the person to whom it was addressed.* (Citing cases.) As was said by Gray, J. in the case last cited [*Huntley v. Whittier*, 105 Mass. 391], 'the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty, in the usual course of business, and when it is opposed by evidence that the letters never were received it must be weighed with all other circumstances of the case, by the jury in determining the question whether the letters were actually delivered or not.' "

Accord:

Columbian Nat'l Life Ins. Co. v. Rodgers (C. C. A. 10th), 93 F. 2d 740;

Atlantic Dredging & Construction Co. v. Nashville Bridge Co. (C. C. A. 5th), 57 F. 2d 519;

Hand & Johnson Tug Line v. Canada Steamship Line (C. C. A. 6th), 281 Fed. 797;

Weniger v. Success Mining Co. (C. C. A. 8th), 227 Fed. 548.

See also Subsection 24 of Section 1693 of the Code of Civil Procedure of the State of California.

A recent decision of the Court of Appeals for the Tenth Circuit forcefully illustrates this principle. That case is *Crude Oil Corp. v. Commissioner of Internal Revenue*, 161 F. 2d 809, which was a petition to review a decision of the Tax Court against the taxpayer. The sole issue in that case was whether or not the taxpayer had "filed" before a certain date a capital stock tax return. The taxpayer presented evidence that the returns were enclosed in an envelope properly addressed and the envelope was deposited in the United States Mail in sufficient time to have been received by the Collector within the statutory filing period. The Commissioner introduced evidence as to the usual manner of handling mail received by the Collector's office in question. The Tax Court ruled against the taxpayer not on the ground that the return was not filed within the statutory period, but merely on the ground that the presumption of delivery was insufficient to over-

come the presumption of correctness of the commissioner's determination. In reversing the Tax Court the Court of Appeals for the Tenth Circuit states:

"We think the Tax Court fell into an error of law. The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced.

"When mail matter is properly addressed and deposited in the United States Mail, with postage duly prepaid thereon, there is rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.

"The presumption of receipt is a strong one. A finding in opposition to such inference of fact, absent evidence of non-receipt, is against the weight of the evidence.

"Proof of due mailing is *prima facie* evidence of receipt.

"It follows that the proof of regular mailing, in time to reach the Collector, in due course of mail, within the statutory filing period, was sufficient to support a finding that the return was timely filed; that the presumption of correctness attached to the Commissioner's finding vanished; and that the issue was for decision wholly on the evidence." (161 F. 2d at 810.)

Since the finding of the Court below that the registration was "duly filed" was supported by substantial evidence, we respectfully submit that the finding is binding on this Court.

III.

This Being a Proceeding in Equity, the Trial Court Had the Discretion to Determine Whether an Order for Restitution Was Necessary or Proper Under the Circumstances, and There Has Been No Showing That the Discretion Was Abused in the Present Case.

On page 19 of appellant's opening brief, reference is made to the decision of the Supreme Court in *Porter v. Warner Holding Company*, 328 U. S. 395. The quotation from the opinion of the Supreme Court as contained in appellant's brief demonstrates that an enforcement action in which the Housing Expediter seeks to enjoin a violation of the rent regulation and to compel the landlord to make restitution is directed to the equity side of the Court. The opinion of the Supreme Court goes on to state (328 U. S. at 403):

"It follows that the District Court erred in declining, for jurisdictional reasons, to consider whether a restitution order was necessary or proper under the circumstances here present. The case must therefore be remanded to that Court so that it may exercise the discretion that belongs to it. If the Court decides to issue a restitution order and should there appear to be conflicting claims and counter-claims between tenants and landlord as to the amounts due, the Court has inherent power to bring in all the interested parties and settle the controversies or to retain the case until matters are otherwise litigated."

Independently of the grounds hereinabove stated for affirmance of the judgment below, it seems clear from the record in this case that the trial court duly considered the necessity or propriety under the circumstances of this

case for an order of restitution and for an injunction. Thus the landlord [Tr. 70 to 87] and tenant [Tr. 63 to 70] were before the Court, and evidence as to conflicting claims between them was introduced [Tr. 83]. After hearing all the evidence the Court stated [Tr. 98] “and I may say that this is another one of the cases where the persons occupying the premises conclude to enrich themselves at the expense of the landlord, and I do not approve of that.”

Conclusion.

On the basis of the foregoing authorities and the record in this case, the judgment below should be affirmed.

Respectfully submitted,

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GENDEL & CHICHESTER,

Attorneys for Appellee.



